



July 28, 1725.

INFORMATION

FOR

JAMES,

Marquis of CLYDESDALE,

and His Grace the Duke of HAMILTON
his Guardian;

AGAINST

THOMAS, Earl of DUNDONALD.

WILLIAM, last Earl of *Dundonald*, died without
Issue of his Body; and upon his Death, the Mar-
quis of *Clydesdale*, an Infant, by his Guardian
claim'd the the Estate of *Dundonald*, as descend-
ing to him, in Virtue of a Deed of Settlement, made by *John*
Earl of *Dundonald* his Grandfather; whereby, in Default of
Male.

28 Jan.
1725.

Male-issue of him, or the Descendants of his Body, the Estate is devised to Lady *Anne Cochran* his eldest Daughter, afterwards Dutches of *Hamilton*, now deceased, and the Heir-male of her Body; which Heir is the present Marquis of *Clydesdale*; and the proper Methods were pursued, for making out the Marquis's Titles, according to the Law and the Forms in *Scotland*.

1716. *Dec.* *Thomas*, Earl of *Dundonald* objected to this Claim, insisting, " That the said Marquis was not Heir to this Estate, even according to the Deed made by his Grandfather; and that supposing he were, that Deed could give him no good Right, for that by the former Settlements of the Estate, the same was entailed to Heirs-male, in such Manner, as that *John* Earl of *Dundonald* was limited and restrained from making any Alteration in the Succession, or giving the Estate to an Heir-female, in Prejudice of him, who is the Heir-male of the Family". And Parties having been heard by their Counsel at great Length upon their several Titles and Objections, your Lordships were pleased to order the Heads of the Debate to be drawn up in Writing, in Form of Informations.

IN order to a full understanding of the Points in Controversy, it is necessary to take Notice of the ancient Settlements of this Estate, and of the several Variations which they have received from Time to Time; and therefore your Lordships will please be informed,

1601. THAT the Family of *Dundonald* are descended by the Father's Side, or according to the paternal Line, of *Alexander Blair*, third Son to *John Blair* of *Blair*, who was married to *Elisabeth Cochran*, third Daughter to *William Cochran* of *Cochran*, by whom he had the Estate of *Cochran*.

1647. *Dec.* THAT this Estate descended to a second Son of that Marriage, afterwards designed Sir *William Cochran* of *Cowdan*, who was created Lord *Cochran*, and had that Honour limited to him, and the Heirs-male of his own Body.

THE



THE said *William* Lord *Cochran*, in the Contract of Marriage betwixt *William* Master of *Cochran* his Son, and Lady *Catharine Kennedy*, settled his Estate of *Ochiltree*, *Dundonald*, &c. upon the said *William* Master of *Cochran*; and the Heirs-male, lawfully to be procreate betwixt him and the said Lady *Catharine Kennedy*; which failing, to return to the said *William* Lord *Cochran*, his Heirs and Assigns whatsoever; but with a Power to him the said *William* Lord *Cochran* to redeem the Estate, upon Payment of ten Merks, excepting the Lands of *Ochiltree* and *Trabrough*; upon which Contract there was a base Infestment taken: But altho' the Lands lay in different Shires, Part of them in the Shire of *Air*, and a great Part of them in the Shire of *Renfrew*, the Sasine was only registrate in the Shire of *Air*, and not in the Register appointed for *Renfrew*.

1653.

By another Contract anno 1656, the Master of *Cochran* re-dispon'd the Lands of *Ochiltree* and *Trabrough*, to the said Lord *Cochran* his Father; and the Lord *Cochran* dispones to the said Master, and the Heirs-male betwixt him and Lady *Catharine Kennedy*; which failing, to return to the said *William* Lord *Cochran*, his Heirs and Assigns whatsoever, the Lordship of *Paisley* and others, reserving the Liferent to the said Lord *Cochran*, and containing a Provision of *L. 5000 Scots* for the Sustenance of the Master and his Lady.

1656.

By another Contract in the 1657, the Lord *Cochran* discharged in Favours of his Son, and the Heirs-male of that present Marriage; which failing, to return to the Lord *Cochran*, his Heirs and Assigns, the Powers of Redemption competent by the Contract 1653: In Consideration whereof, the Master of *Cochran* was obliged to charge the Estate with a certain Sum, towards the Payment of his Father's Debts, which never appears to have been done; and by the After-writings it would seem, that this Contract has been intirely passed from.

1657.

IN the 1659, *William* Lord *Cochran* was infest upon a Charter from the Crown, of the greatest Part of the Lands,

1659.

which *John Lord Cochran* obliges him, That he shall never do any Fact or Deed to prejudice the Heirs-male to be procreate of this Marriage, to succeed to him in the foresaid Lands and Estate, by preferring the Heirs or Children to be procreate of any other Marriage to the same: But Prejudice always to the said *John Lord Cochran*, as Fiar of the said Estate, to contract Debts, or sell and dispoise upon any Part thereof, for any other Cause as he shall think fit. And in Pursuance of the above Obligation, to grant a particular Renunciation of the Earl's reserved Powers, there was one executed in a Paper apart soon after this Contract.

November
1684.

22. October
1688.

THE said *John Lord Cochran*, then Earl of *Dundonald*, executed a Bond of Tailie, Anno 1688, with Procuratory of Resignation in due Form, in favours of himself in Liferent, and to *William Lord Cochran*, his eldest lawful Son in Fee, and the Heirs-male of his Body; which failing, to the Heirs-male of the said Earl's Body; which failing, to the eldest Heir-female of his Body, without Division; which failing, to *Kilmaronock* his Brother, and the Heirs-male of his Body; which failing, to his other Brothers, and the Heirs-male of their Bodies; which failing, to his Heirs-male whatsoever; which all failing, to his Heirs and Assigns whatsoever, the eldest Heir female always succeeding without Division: With a Proviso, That the said Bond of Tailie should be valid, effectual and obligatory to force and compel the said Earl, his Heirs, as well Male, Tailie, Conquest and Provision, as Heirs general and of Line; and all others his Heirs, to fulfill the same in the haill Heads and Clauses thereof.

THE said *John Earl of Dundonald* died in the 1690, and was succeeded by *William* his Son, who was served Heir in general and special to him the same Year, and died in his Minority.

THE said *William* last named, was succeeded by *John Earl of Dundonald* his Brother, Grandfather to the Marquis of *Clydesdale*, who was served Heir to *William* in the 1706, and
by

by Contract betwixt the said Earl *John* and Lady *Anne* ^{27. March 1706.} *Murray*, he provided his Estate to himself, and the Heirs-male to be procreate in that Marriage; which failing, to the Heirs-male of any other Marriage; which failing his Heirs-male whatsoever; which failing his Heirs and Assigns whatsoever.

AND as to this Contract, it may well be observed, That it does indeed differ from the last Settlement made by that Earl's Father, in so far as it prefers his Heirs-male whatsoever to his Daughters; and how this came about, is pretty obvious; the Earl was then Minor, under the Influence of *Kilmarnock* his Curator, who was the Heir-male whatsoever. Nevertheless there is a saving Clause in the Earl's Favours, but not framed without some Art and Precaution; whereby it is declared, That the above Destination, failing Heirs-male of the Marriage, should be without Prejudice to the said Earl, to alter or innovate the same at his Pleasure, in so far as by Law he had Power by the former Tailies of the Estate of *Dundonald* made by *William* Earl of *Dundonald* his Great-Grandfather, or *John* Earl of *Dundonald* his Father, or any other Tailie or Rights of the said Estate, made by his Predecessors.

IN the Year 1716, the said *John* Lord *Dundonald* having ^{30. Dec. 1716.} only one Son *William*, the last Earl, from whom he had no great Expectation of Issue, executed the Deed under which the Marquis of *Clidale* now claims, by which, failing Heirs-male of his own Body, or of any of the Descendents of his Body, he obliges himself, his Heirs of Line, Male, Tailie, Conquest, and Provision, and Successors whatsoever, to provide and secure his Lands, Lordships, &c. in Favours of Lady *Anne Cochran* his eldest Daughter, and the Heirs-male lawfully to be procreate of her Body; which failing, to his other Daughters, and the Heirs-male of their Bodies; which failing, to his other Heirs-male whatsoever; which all failing, to his other Heirs and Assigns whatsoever.

3. *August*, 1722. IN the 1722, *William* the last Earl executed a Procuratory of Resignation in Favours of Lady *Anne*, failing Heirs of his own Body, agreeably in Substance to the Intention of his Father, and in Implement of the said Obligation, in so far as conceived in Favours of Lady *Anne*: But in *January* last, 1725. when the said Earl was at the Point of Death, incapable through the Pressure of Sickness to make or understand any Deed, there is a Revocation of the said Procuratory framed; and is now produced as subscribed by the Earl, with Concourse of *Ochiltree* elder and younger, and *Ferguslee*, three of his Curators; as likewise a new Deed of Settlement in Favours of the present Earl of *Dundonald*, and the Heirs Male of his Body; and the very next Substitution, to *Ochiltree* himself and his Son, two of the Curators who authorised the Minor in signing of the Deed.

THUS your Lordships have a general View of the several Settlements of the greatest Part of the Estate of *Dundonald*; there are Conveyances of particular Lands, in which the Substitutions were mostly to the Heirs whatsoever before the said Contract 1706; which 'tis needless to enter into the Detail of, since it would serve only to imbarass the principal Question.

FROM this State of the Writs, these general Observations may be made on Behalf of the Marquis of *Clydesdale*, 1^{mo}, That it seems to be very far from an unnatural thing, that the Succession of this Family of *Dundonald* should descend to an Heir Female, when the very Foundations of the Family were laid by the Inter-marriage of *Alexander Blair* alias *Cochran* with *Elisabeth Cochran* an Heir Female. 2^{do}, That *William* the first Earl of *Dundonald* seems to have been very little anxious about the securing his Estate to Heirs Male, in Preference to Females, when he suffered the Settlement of the Estate, failing Heirs of his Son *William's* Body, which was an uncertain Event, to continue so long fixed to his Heirs and Assigns whatsoever, even as far down as the Year 1680, where-

whereby his other Sons, if he had had any, might have been excluded by his Son's Daughter; and a third Son and his Male Issue excluded by the Female Issue of a second Son. 3^{to}, That he took as little Care to keep the Honours and Estate conjoin'd, because his Patent was to his Heirs Male general; whereas, failing Heirs of his Son's Body, his Estate stood provided to his Heirs whatsoever: And so, upon the Failure of Heirs Male of that Son's Body, the Honours and Estate would have separate. 4^{to}, That altho' by the Settlement in the Year 1680, the Heirs Male of the Earl's Body are preferred to the Heirs Female, yet both by that Deed, and yet more strongly by the after-Deeds 1684, the Fee is settled in the Person of *John Lord Cochran* in the most absolute manner that could be contrived: The very Word **absolute** is used in the Deeds, and no kind of express Limitation or prohibitory Clause. 5^{to}, That it is intirely irrational to imagine, that the said Earl could intend any Limitation, since according as the Law and Practice then stood, it was almost as easy, by a Resignation, to alter the Descent of Honours, as to change the Destination of his Estate: And since this could not be prevented by any Deed of his, 'tis unreasonable to suppose he would incapacitate the Fiar from conjoining both together. 6^{to}, It is obvious from the Contract 1684, that Parties then had it in their View to settle the Estate in Favours of the Heirs Female of that Marriage, in Default of Male Issue, because of the express Reservation and Power to dispose for any Cause, one excepted reserved to *John Lord Cochran* in that Contract. 7^{mo}, According to what was then understood, we see that *John* then Earl of *Dundonald*, by the Tailie 1688, provides the Estate to the Heirs Female of his Body preferably to his collateral Heirs Male, and expresses the greatest Anxiety to make that Bond effectual. 8^{vo}, Tho his Son's being under the Influence of Curators who were themselves Heirs Male, did not perfect that Entail, yet tho *John* Earl of *Dundonald*, in the Contract 1706, is induced to prefer his

Heirs Male in general (which might have comprehended the Family of *Blair*) to his own Daughters, yet he secures to himself a Power of Alteration, failing Heirs Male of his Body, having it no Doubt in his Eye how much nearer his own Daughter would be to him than an extraneous Heir Male.

AND therefore in the *Last* Place, when the State of the last Earl's only Son gave him no Hopes of Issue of his Body, he settles his Estate, failing Issue Male, upon his Daughter as his natural Heir; and whether there were any other collateral Reasons, from the Alteration of the Settlement of any other Estate, is needless further to enquire, than to shew that if it was so, there can be little Question as to the Meaning and Intention of that Deed 1716.

IT is upon this Deed 1716 (of which a Copy is hereto annexed) that the Marquis of *Clydesdale* claims the Estate of *Dundonald*, as being the Heir Male of the Body of Lady *Anne Cochran* deceased; and so by Virtue of this Nomination, and the Procuratory 1722, made in Implement of it, Heir of Provision to *William* the last Earl of *Dundonald* his Uncle.

Object. 1. THE *First* Objection made in Behalf of the present Earl of *Dundonald*, was, " That the Provision of Succession here-
 " in made to Lady *Anne* and the Heirs Male of her Body, is
 " only conditional, failing Heirs Male of *John* the Maker
 " his Body, or Heirs Male of any of the Descendents of his
 " Body; but that so it is, this Condition hath not existed,
 " since the present Earl of *Dundonald* is Heir Male to *Wil-*
 " *liam* the last Earl of *Dundonald*, who was Descendant of
 " the Body of Earl *John*; and that altho' there might some
 " Incongruities arise from the explaining the Condition in this
 " manner, yet in so favourable a Case, in Order to continue
 " the Estate conjoin'd with the Honours, it is in your Lord-
 " ships Power to stand closely by the Letter of the Condition,
 " even tho the Effect of it should be to render the whole
 " Deed incongruous and elusory."

It was answered, *First*, That the Marquis's Claim is well *Answered* founded, according to the very Letter of the Clause: The Condition is, *Failing Heirs-male of the Earl's own Body*; which Word *own*, if it have any Meaning at all, it shews that the Earl by that Part of the Clause meant Heirs-male immediately procreate of his Body, that is, Sons, and by that Word distinguishes his Sons from Grandsons, who in the legal Sense are Heirs-male of his Body, and yet in the more limited and strict Sense are not Heirs-male of his own Body, that is, immediately procreate of him; and then follows, *and Heirs-male of any of the Descendants of our own Body*, that is, Heirs-male procreate immediately of a Son or Grandson; for there is no Difference in common Construction or Grammar betwixt the Heir-male of any Person and the Heir-male procreate of the Body of that Person, but there is a Difference betwixt a Man's Heir-male and the Heir-male of that Man: A remote collateral Relation may be his Heir-male, but he is not the Heir-male of him, for that has no other Meaning than Issue of him, procreate of him, or descended of him; and therefore according to the literal Meaning of the Words, the Condition has existed. There is no Heir-male of, or procreate of any of the Descendants of Earl John's own Body, unless it be the Marquis of *Clydesdale*, who tho he is a Male procreate of one of the Descendants of the Earl's Body, yet he is not an Heir-male in the Sense of the Clause, because it appears, by *Heirs-male* the Earl meant Heirs descendent by a connected Line of Males without Interruption of Females. But then neither is the present Earl of *Dundonald* Heir-male of the last Earl; he is not at all of him, altho he is the remote Heir-male to him. And indeed if the Clause were to be taken so very literally as the Objection pleads, the Marquis of *Clydesdale* might have a better Plea than the present Earl: He might say, That he is Heir-male of a Descendent of the Earl's Body, *viz.* Lady *Anne's*; That by this Clause he is *positus in conditione*, and

so must be understood to be likewise *postus in institutione*, and so called to the Succession even preferably to his own Mother, and might with better Reason than the Objector pleads to be Heir-male of the last Earl, insist, That it was his Grandfather's Intention to give the Estate even to the Issue-male of his Daughters, in case they existed at the Time of opening the Succession, preferably to the Daughters themselves, and to call the Daughters only in case of their Non-existence; and then in the Event of the Estate's once being settled in the Person of the Daughters, to make it descend to their Heirs-male. But it is unnecessary, and indeed contrary to all Rules of Interpretation to hang so close by the Letter of a Clause, as to confound the whole obvious Intention of the Deed; and therefore the Marquis insists upon that, which every Body must see is the true Meaning, as well as agreeable to the strict Letter, that an Heir-male of the Descendent is an Heir-male procreate of the Descendent, and no other; and that therefore the Condition hath existed. There is no Heir-male in being, of any Descendent of Earl John's Body, who may succeed by a connected Descent from Males, without Interruption from Females; and therefore the Succession devolves to the first Heir-female, who was Lady Anne, and the Heir-male of her Body. And as our Substitutions are directly Translations of the *Roman* and *Feudal* Substitutions, the thing will still be plainer, if the Expression be returned into its Original, *Deficientibus heredibus masculis ex corpore meo*. Or, *Corporis mei, vel cujusvis descendendum ex corpore meo*. This is the Way the Earl's own Council inclined to turn it, and the Explication is submitted to any Body, and whether the Words *ex corpore*, or *corporis cujusvis descendendum*, must not in common Construction of Latin be understood to be repeated.

In the Next Place, If we consider the rest of the Deed, it is impossible there can remain any Difficulty as to the Meaning; for, *imo*, If the Earl of *Duudonald* had designed, that the

the remoter collateral Heirs-male to his Son should all fail before the Succession devolved to his Daughter, to what Purpose use so strange an Expression, and not the common short Stile, *Failing my Heirs-male*? Or why speak of an Heir-male of a Descendent of his Body at all, when it was so much more natural to speak of his own Heirs-male only? 240. Is it to be imagined, that the Earl intended to prefer even his own or his Son's remotest Heirs-male to his own Daughter, and so send the Estate to the Family of *Blair*, preferably to Lady *Anne*? 310. Your Lordships will particularly observe, that he obliges his Heirs-male, upon the Existence of the Condition, to resign in Favours of Lady *Anne*. Now if the Condition be to be explained in the manner the Earl does, who is that Heir-male that was to resign, or possibly could resign in Favours of Lady *Anne*? Every Heir-male who could serve, was in the Sense of the Objection Heir-male to the last Earl. If then all those must fail before the Condition be purified, who was the Heir-male who was to resign? Sure none at all. Which indeed of itself, without more Argument, is sufficient to demonstrate the Absurdity of the Objection. But then, 410. This is yet made clearer by the Substitution, where failing the three Ladies and the Heirs-male of their Bodies, the Earl's Heirs-male whatsoever are called to the Succession, even preferably to the Female-issue of the Daughters. Now if all the Heirs-male were to fail, before Lady *Anne* could succeed, how is it possible to find out an Heir-male who could succeed upon the Failure of Lady *Katherine's* Male-issue, preferably to the Female-issue of all the three Daughters?

THE Lawyers for the Earl endeavoured to cover a little these Absurdities, by pretending, " 110. That the Maker of the Deed had certainly err'd in Stile, whatever Way the Writing was explained, since he made a Distinction betwixt the Heir-male of the Body of his Descendent and the Heir-male of his own Body, which in Law are the same, and

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“ so there was no need of the second Clause in the Condi-
 “ on, since all was comprehended under the first, *Failing*
 “ *Heirs of his own Body.* 2do, That by Heirs-male of any
 “ of the Descendents of his Body, might be meant such Heirs-
 “ male as by the former Investitures were called to the Suc-
 “ cession, which would only comprehend the Heirs-male de-
 “ scendent of the Body of the first Earl *William*; and then
 “ by other Heirs-male, who are substitute in the Destination
 “ to the Male-issue of the three Ladies, might be meant such
 “ Heirs-male as were not called by the Investiture, *viz.* the
 “ Heirs-male whatsoever of the first Earl *William.* 3tio,
 “ That it was no extraordinary thing, that he obliged Heirs-
 “ male to resign, altho Lady *Anne* was only to succeed upon
 “ their Failure, because he likewise obliged himself to resign,
 “ who by the Nature of the thing was to fail first of all.”

But those Replies will be found too superficial: For, 1mo,
 There is no Error in Stile, according to the Explication put
 upon this Deed by the Marquis, tho' perhaps there is a Super-
 fluity, a Thing not uncommon to Writers, who generally,
 the less knowing they are, give the more Words. The Earl
 might doubt if a Grand-son was, strictly speaking, an Heir of
 his own Body, and if there was not a Difference betwixt an
 Heir of his own Body, and an Heir of his Son's Body; and
 therefore he uses different Expressions where one might have
 done. This may be a Redundancy, but it is no Error. He
 might likewise have express'd the three Substitutions to his
 three Daughters, and their Male-issue in one Clause: Still it
 is no Error to make Use of three. 2do, By what Authority
 or Rule of Interpretation can the Earl's Lawyers foist in a
 whole Clause into the Condition, *viz.* *Who are called to*
succeed by the Investitures. Those for the Marquis endea-
 vour to put in no Words at all, but at most call for a Re-
 duplication of Words, which Propriety of Language requires
 to make the Sense complete. But to add a whole Clause,
 which is by no Means implied in any Words that appear in
 the

the Substitution, is indeed very new; and if they assume to themselves this Liberty, they can never be straitned in Interpretation. Adding a Clause will still do the Business. And if they'll allow the same Liberty to the Procurators for the Marquis, they will undertake to make any one of the Family of *Dundonald* Heir the Objecter is pleased to name. But then, 3^{rdly}, This Addition won't help them out, for two Reasons: 1^{stly}, If all the Heirs-male called by the Investiture were to fail before there was to be a Resignation in Favour of Lady *Anne*, what Heir-male could resign? None could resign, but who could serve; and none could serve but an Heir of the Investiture, and so the Absurdity still remains. 2^{dly}, The other Heirs-male called to the Succession, failing Issue-male of the Daughters, could not be such Heirs-male as were not formerly called, because by the Contract of Marriage 1706, failing Heirs-male of that Marriage, the Estate was provided to the then Earl's Heirs-male whatsoever, which comprehends the remotest Heir-male that possibly could exist, even in the Family of *Blair*; and so according to the Objection, 'tis impossible to find any Heir-male that could have succeeded after the Male-Issue of the Daughters. Nor will the Observation that the Earl obliges himself to resign as well as his Heirs-male, be of any Use in this Case; for there is nothing more common and regular, than for a Man to lay an Obligation upon himself, which, by the Nature of the Thing, is to be executed only by his Heir, in order to avoid the Subtlety which the Doctors have insisted on, That a Man could not make an Obligation begin from his Heir; but must lay it first upon himself, and then upon the Heir, as Heir to him: And so it is common for a Man to oblige himself and his Heirs to pay such a Sum after his Death; but it never was seen or heard of, That a Man obliged his Heir to perform any Deed, which, by the Nature of the Thing could not be performed until that Heir failed.

BUT

But then there is indeed somewhat further to be observed, as to the Obligation the Earl lays upon himself to resign, which is of considerable Use to explain the Condition. The Earl had at that Time only one Son, and little Hopes of Issue from him; and had it even in View that he might fail in the Earl's own Time; and in Case of that Event, he obliges himself to resign in Favours of Lady Anne, altho' no Doubt his Resignation was to contain the Condition *in premis* of it, in Case the Resigner should afterwards have had more Sons. Now this further explains the Meaning of the Condition, That by an Heir of the Descendents of the Earl's Body, was understood a Person who could have been Heir-male to the Earl's Son or other Descendent, even in the Earl's own Lifetime, which could apply to no other but an Heir-male procreate of the Descendent's Body, because the Earl himself intervened betwixt the present Earl, or any other collateral Heir-male, and the Descendent of his own Body; and no such collateral could be Heir to the Descendent during the Earl's Life: And therefore when he obliges himself to resign, failing Heirs-male of the Descendent, it must be understood such Heirs-male as might be Heirs, and yet be supposed to have fail'd even in the Earl's own Lifetime. And tho' in the strictest legal Sense it may be pretended, That Heirs-male of his own Body could not fail during his Life, because there was still a Possibility he might have had another Son; yet there might be a moral Certainty in his own Life that he could have none; besides that he had a particular Eye upon the Heir-male of his own Body, existing at the Time he made the Deed: And therefore upon Examination of the whole Deed, and comparing it with the Objection, the last Part of the Solution was the most ingenuous, tho' not the most becoming a Lawyer; that it was no Matter suppose the Deed should be rendred clusory, and inconsistent: The Favour of the Case, requires it should be so. But unhappily the Law determines, That *interpretatio ista facienda est, ut magis actus valeat quam pereat*; and when

when that is done, no Manner of Difficulty can remain as to the Marquis of *Clydsdale's* being the Heir now called to the Succession in Virtue of it. If there were any Need of collateral Arguments to explain *John Earl of Dundonald's* Intention upon this Point now in Question, it might be observed, That so long as he had it in his Eye, that the Estate in Pursuance of the Contract of Marriage 1706, might descend to extraneous Heirs-male, to the Exclusion of his Daughters, he provided those Daughters to one Bond of 16000 *l.* which indeed was to be a Burden even upon the Heirs-male of his Body, and 7000 *l.* more in a separate Bond, which was only to take Place in Case of the Estate descending to extraneous Heirs-male, failing the Heirs-male of his own Body. But at the very Time, that is, within the Distance of a Day, that he made the Deed 1716, by which the Estate was settled upon his Daughters, he restricted these Bonds to 8000 *l.* upon the near Prospect he had, that in all Probability the Estate would descend to them.

THE Lawyers for the Earl were pleased to say, That this Alteration happened only because of the Change of the Circumstances of his Estate, which at that Time was more heavily charged with Debt than it had been in the 1711, when the first Bonds were made; and took Notice, That he not only took away the additional Provision that was to have lye upon the extraneous Heirs-male, in Case of their Succession, but reduced the other Provision, which was to have been a Burden upon the Heirs of his Body from 16000 *l.* to 8000.

BUT, with Submission, the Force of the Argument still remains; he might lessen the Burdens upon his Son, because of the Increase of Debt; but still in Pursuance to his former Sentiments, he would have given higher Provisions to his Daughters in the Event of the Estate's going to an extraneous Heir-male, than in the other Event of its descending to his Son; and the Alteration happening at the precise Time that he made the Deed 1716, is a very plain Evidence of the near
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Prospect he had of his Daughters succeeding at least preferably to the extraneous Heir-male.

Object. 2. THE *Second* Objection made, was, " That this Deed had not
" been completed by Infeftment in the Lifetime of the Ma-
" ker, nor recorded in the Register of Tailies; and there-
" fore was not effectual, at least might be neglected and re-
" pudiate by the Maker's next Heir."

Answers. THIS will require very little Answer, and scarce deserves any Notice. *1mo*, By the Nature of the Thing the Deed did not fall to be completed by Infeftment, during the Life of the Granter; it was an Obligation in Favours of Lady *Anne*, to take Place upon a certain Event only, which did not happen during the Granter's Life, for the Heir-male of his Body survived him. *2do*, 'Tis absurd in Law to say, That a Bond of Tailie, or any Nomination of Heirs, is not effectual, unless it be brought into an Infeftment during the Makers' Life. *3tio*, No Destination needs be recorded in the Register of Tailies, in which there is no irritant, resolute or prohibitory Clauses; and here there are none: And as little is there any Law requiring the strictest Entails to be registrate in the Life of the Maker. *4to*, There can be no Question whether the Maker's next Heir could have repudiate this Deed or not; because he did not repudiate it, but did acknowledge it, and granted a Procuratory of Resignation in Implement of it, with a small nominal Variation, since there was no Prospect of his having any Daughters. And, *Lastly*, He could not repudiate this Deed, because it was not conceived at all in his Favours. It was in favours of Lady *Anne*, upon his Failure; and no Man can repudiate, but who can accept, and in whose Favours the Deed is conceived; which puts the Matter quite out of the Question, how far the first Institute in a Tailie can pass by it, and possess by other Titles.

Object. 3. THE *Third* Objection was, " That this Deed 1716, and
" the Procuratory granted by the last Earl in the 1722, were
" both revok'd by the same last Earl in the 1725, and a new
" Deed made in Favours of the present Earl for a valuable
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" Consideration; this Earl at the same Time having settled
 " his Estate, failing Heirs-male of his Body, upon the last
 " Earl, and his Male-issue; and that, altho' this Revocation
 " was on Death-bed, yet it could not be quarrelled by the
 " Marquis of *Clydesdale*, because he is not Heir of the In-
 " vestiture to the last Earl, but at most only Heir to the Obl-
 " gation contain'd in the Deed 1716: And further, That the
 " Deed 1716, and Procuratory 1722, being of their own Na-
 " ture revocable Deeds, they might even be revoked on Death-
 " bed; in Support of which, the Decision *Ker contra Ker*,
 " and that in the Question of the Succession of *Saltcoats*,
 " were quoted, and the Case of a Donation made by a Man
 " to a Wife, *stante matrimonio*, which is allowed to be re-
 " vocable, even on Death-bed. And to obviate what nat-
 " urally must occur, as to the Condition of Health the
 " Earl was in, in Point of Judgment and Capacity, and the
 " Manner these last Deeds were executed by Authority of
 " Curators, who were to be Gainers by the Deed; It was
 " said, That the Earl was much in the same Health he had
 " been in for a long Time before, even at the making the
 " Procuratory 1722; and that, altho' the Curators were Sub-
 " stitutes in the new Deed, they might authorize the Mi-
 " nor, since it was not immediately in their Favours."

To this it is answered, *imo*, That the Pretence of the Re- *Ans.*
 vocation's having been made for a valuable Consideration, is
 indeed very extraordinary, and without a good Deal of As-
 surance could not have been mentioned by the Lawyers. The
 present Earl entailed his Estate (whether he had Power or
 not, is uncertain) failing Heirs of his own Body, to the last
 Earl, and the Heirs-male of his Body, a few Days before he
 died, when every Body saw, he neither could live to enjoy
 the Estate, nor have Heirs procreate of his Body. *2do*, 'Tis
 a very great Mistake, that the Deed 1716 was at all revocable
 by the last Earl; and the Lawyers on the other Side con-
 founded two Things, intirely different, a Power to alter and

a Power to revoke. No Man can revoke a Deed, but either he that made it, or who by Virtue of a Faculty in it, hath a Power given him to revoke it. But any Man may alter a Deed of Settlement, who succeeds as Heir to the Maker, if he be under no prohibitory Clauses or Restrictions; and therefore, supposing it were true, as it is not in all Cases, that a Person, who hath Power to revoke a Deed, may revoke it on Death-bed, it will by no Means follow, that a Man, who has a Power to alter a Deed, can alter it on Death-bed. And sure this cannot escape the Earl's Lawyers, if they reflect upon it; otherwise no Alteration of Succession could be reduced *ex capite lecti*, since no Person can make the Alteration, but he that has a Power to alter; and consequently, if their Doctrine were tenable, the Power of Alteration would support every such Deed done on Death-bed; and so in short the Law of Death-bed could be of no Manner of Use.

3thio, They have not thought fit to distinguish betwixt a Deed revocable, on Account of it's not having been compleated by Delivery, and a Deed that is alterable by the Nature of the Deed it self, as leaving the Maker in the absolute Fie, without Restriction or prohibitory Clause. There is no Doubt, that a Deed not compleated by Delivery, or which either by express Clause, or the Nature of the Thing, requires to be compleated by the Death of the Granter, in place of a formal Delivery, may be revok'd or altered on Death-bed; but the Case is quite different, where a Deed is compleated by Delivery in the Lifetime of the Maker: For there altho' it be alterable, yet if it be in Favours of an Heir, or do constitute the Person, in whose Favours it is conceived, Heir to the Maker, it cannot be altered on Death-bed; which is plain from the very Nature of the Law of Death-bed, and Reasons upon which that Law hath been introduced, and is confirmed by your Lordships Decisions, as shall by and by be proved.

By applying of these Observations to the Case in Hand, your Lordships will easily see, how far the Arguments fail on
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the Earl's Side, since 1^{mo}, The Deed 1716, however it might be alterable by the last Earl, could not be revoked, being made by his Father, and compleated by his Death, without any need of further Delivery. 2^{do}, The Procuratory of Resignation granted by the last Earl himself, was likewise compleated by Delivery, there being a *Sederunt* of himself and Curators, expressly ordering the Delivery in Favours of Lady Anne. 3^{tio}, It being granted in Implement of the Obligation laid on by his Father, by the said Deed 1716, it was not ambulatory or revocable, in the same Manner, as if it had been gratuitously granted by himself, without any previous Obligation; tho' at the same Time, to avoid some other nice Distinctions, this needs not be much insisted on, since the Procuratory being compleated by a formal Delivery, it could not be revoked, however it might be altered, he still remaining Fiar; and yet it will not be granted, that the Deed 1716 could at all be altered by the last Earl, for Reasons to be offered to your Lordships in their proper Place.

4^{to}, The Gentlemen on the other Side don't observe the Difference betwixt the Power of Alteration, arising from the Nature of a Fie, and of a simple Destination, without restrictive Clauses; and that which arises from a reserved Power or Faculty, contained in an original Deed, especially where that Power of altering is exprels'd to take Place, *etiam in articulo mortis*. In such Case, the reserved Power is a *quasi* Contract or Condition, under which the original Right is granted; and so the Receiver of the Right can't object to the Exercise of that Power, with and under the Burden of which, his own Title is given and established, and no otherwise.

WHEN these Things are adverted to, the Decisions and Examples quoted for the Earl can be of no Use: For 1^{mo}, As to the Case of *Saltcoats*, besides that it was a Matter agreed and settled betwixt the Parties, the Decision intirely run upon the reserved Power to alter, which is quite out of this Case. 2^{do}, As to a Donation betwixt Man and Wife, that is not at all

all to the Purpose, neither Man nor Wife are constitute Heirs to one another by such a Donation, and so the Case does not fall under the Law of Death-bed: Besides, a Donation betwixt Man and Wife, is of the Nature, and hath the same Effects with an undelivered Evident; it is not properly compleat, during the Subsistence of the Marriage, *sed morte tantum confirmatur.*

As to the Case, *Ker contra Ker*, which was the Subject of two Decisions, one the 9th of *December* 1676, and the other the 21st of *January* 1677. The Answers to it are obvious from what is already said; besides, that the Quotation seems to be intirely misapplied: For in the *first* Place, Allowing it to have any Relation to the Purpose, for which the Earl's Lawyers were pleased to quote it, it signifies nothing, because the Lords went upon a Foundation, that the Deed revoked was in the Hands of the Granter, and not delivered; and therefore alterable at any Time. But *2do*, There was in that Case no Reduction of the Revocation of the Deed, on Account of it's having been made on Death-bed, but a Reduction of the Deed it self, as having been delivered on Death-bed; and so nothing in that Decision can prove, that a Man can revoke a Deed on Death-bed, altho' alterable of it's own Nature.; for the Reduction was not at the Instance of the Person, in whose Favours the Disposition was conceived, but at the Instance of the Heir, to whose Detriment the Disposition was made; and so the Lords found, That the Heir was by no Means prejudged by the Revocation, but had an Advantage, because she was intirely excluded by the Disposition, and came to enjoy the Half by Virtue of the Revocation; so that she was Gainer and not Loser by the revoking of the Deed.

AND as to that Part of the Objection, " That the Marquis of *Clydesdale* can't quarrel the last Earl's Deeds, because he is not Heir to him, according to the Infeftments of the Estate, but only Heir to an Obligation, made by the last Earl's Father; in Support of which, the Authori-

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" ty of Sir *George Mackenzie*, in his Treatise of Enails,
 " where he distinguishes betwixt an Heir, and a Person who
 " has an Obligation from the Defunct, to dispoise or settle
 " his Estate ; as likewise the Authority of *Craig* was cited :
 It is answered, *imo*, That there is no Distinction in the Law
 of Death-bed, betwixt a Right of a Person that is Heir, in
 Virtue of a personal Deed, and him that is Heir by an Inve-
 stiture, compleated with Infeftment. *Craig* indeed points at
 a Distinction ; but his Opinion on that Head hath been in-
 tirely exploded, and justly. The Foundation of the Law of
 Death-bed, was to prevent Persons being imposed upon, by the
 Importunity, not only of Priests, but of near Relations, at a
 Time, when through Weakness they are presumed not to be
 capable of resisting, Solicitation, to alter the Succession to
 their heritable Estate, in Prejudice of those Persons, who du-
 ring their firm Health, were the true Heirs, to whom the E-
 state was by Law to descend, by whatever Manner or Title,
 as Heirs, whether of Line, Male, Conquest or Provision, and
 without any Manner of Distinction, whether they are Heirs
 in Virtue of a personal Deed, or a Deed on which Infeftment
 hath followed. And as this is established by constant Pra-
 ctice, it is unnecessary to take Notice of any other Decision
 on the Point, than that which pass'd in the Case, *Hepburn*
of Humbie contra Hepburn, 25th February 1663, where there
 are three Points determined, every one of which destroy the
 Objection made in this Case. The first is, That the Pursuer
 of the Reduction had a good Title, altho' he had only a per-
 sonal Provision in his Favours, conceived in a Contract of
 Marriage, upon which no Infeftment had followed ; and the
 Reasoning there, was precisely the same with what is now
 made Use of for the Earl of *Dundonald*. 2do, It was deter-
 mined, that the Law of Death-bed did operate in Favours of
 an Heir-male, by Virtue of a personal Provision, even in Pre-
 judice of the Heir of Line, who was Heir of the Investiture :
 How much more in this Case must the Law take Place, in Fa-
 yours

vours of the Heir of Line, in Prejudice of a collateral Heir-male? And 3^{dly}, It was determined, That tho' the Right of the Heir-male arose only from the Deed of the Defunct, who had made a Disposition in his Favours, to the Exclusion of the Heirs of Line, and had reserved a Power to alter; yet that Alteration could not be made on Death-bed, to the Prejudice of that very Person, whom the Defunct had by his own Deed created Heir. And if it be said, that this Case was settled betwixt the Parties, your Lordships will have Regard to what my Lord *Stair* takes Notice of, That the Lords were mostly of Opinion, that these Points were Law in every Case.

BUT last of all, as to this Head, the Lawyers for the Marquis can't help insisting upon it, That whatever may be said as to the Procuratory 1722, the Deed 1716 was not alterable at any Rate by the late Earl, either on Death-bed or in Liege-Houstie. And what they observe on this Point, arises from the very Conception of the Deed: It is an Obligation, which was not to take Effect against the last Earl, but is directed against the Heirs that were to succeed, failing him and Heirs-male of his Body: And therefore, by the Nature of the Thing, they don't comprehend how the last Earl could possibly alter that Deed. Had it been a simple Destination, in which the Earl had been first institute, no Doubt he could have altered it; but since it is not so conceived, but that *John* Earl of *Dundonald*, the Maker of that Obligation, laid it upon the after-Heirs, it is not easy to apprehend how the last Earl, whom it did not affect, could alter it. Let us put the Case, That *John* Earl of *Dundonald* had obliged this present Earl of *Dundonald*, in case of his Succession to the Estate, to have paid to Lady *Ann Cochran* the Sum of *L. 5000*; could the last Earl, by any Deed of his, have liberated the present Earl from that Obligation? 'Tis believed he could not: No more could he free the present Earl from the Obligation to resign the Estate in favours of Lady *Anne*, since Earl *John* could as effectually bind the present Earl to resign, as he could have obliged

bliged him, in the Event of his Succession, to pay to Lady Anne L. 5000. It may indeed be another Question, Whether the last Earl could have rendered this Deed 1716 ineffectual, by conveying the Estate to another, so as to prevent the present Earl his succeeding: But that is not the Case. The present Earl claims the Succession as Heir of the Investiture to Earl John, and so is liable to any Obligation that Earl John laid upon him; and such Obligation never could be defeated by any Deed whatsoever of the last Earl, revoking or annulling that Obligation.

THE other Reasons for avoiding the Revocation and new Settlement by the last Earl, seem so plain that they need only be mentioned: *1^{mo}*, That these are Deeds in Minority; and tho' the Lawyers for the Earl pretended, That a Minor might make a Settlement of his Estate, even gratuitously, and altering former Settlements, such a Deed not being to his own Lession; yet that is without Example, and would be of dangerous Precedent; and is expressly contrary to the Opinion of Sir George Mackenzie in his Treatise of Tailies, where he says, *It hath been doubted, if Minors can make Tailies, even with Consent of Tutors and Curators; and I conceive they cannot: For tho' it cannot be properly said, that they themselves are lesed, seeing they continue still Fiars; yet a Minor may be justly said to be lesed, in that he wrongs his Family and nearest Relations.* Nor will the pretended Favour of Conjoining the Estate and Honours, alter the Case: The Settlement made by the Predecessor is presum'd, in Law, to be the most advantageous for the Minor; and if it be once introduc'd, That a Minor, to whom the Law ascribes a Weakness of Mind, may alter the Deeds of his Predecessor, it will lay them open to such Importunities as may be hurtful to the best Families.

BUT then, in the next Place, no Answer can be made to another Objection, That the late Earl at the Time was incapable of making any Deed. Nor will the Fact be agreed to,
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That he was as capable then, as at the Time of making the Procuratory 1722 : For tho' that could not signifie much, since the Marquis's Claim stands supported by the Deed 1716 ; yet upon Evidence the Matter will come out directly otherwise. That he was very capable in 1722, and absolutely incapable, by Pressure of Sicknes and the Effects of a raging Fever, at the Time of the last Deeds.

THE other Objection, That these Deeds are void, as being no otherwise authorized than by Two Curators, who themselves had a very direct and manifest Interest, and so were *authores in rem suam*, hath received no sufficient Answer. Tho' they were not first Institutes, they are the very next Substitutes ; and therefore, altho 'tis hop'd in no Event they shall profit by their Deed, yet they have done what they can for themselves. Their Interest, according to human Incidents, is so near, that 'tis impossible to say the Deed is not in their Favours ; and of consequence, it is as impossible that they could be warranted in Law, without the Concurrence of a *Quorum* of other Curators, to authorize the Minor in framing such a Deed. And if other Circumstances be conjoin'd, such as their having the Minor in their own House, yea, in their Custody, shut up from other Friends, it can scarce be a Question, whether or not the Deed was unduly elicited.

Objection 4. THE *Fourth* Objection made against the Deed 1716, which is the Marquis's Title, was, " That it proceeded *à non habente potestatem*, for that Earl John, the Maker, was so tied up by the former Settlements of the Estate, in Favours of Heirs-male, that he could not alter the Succession in Prejudice of the present Earl, who is the Heir-male, or give the Estate to his Daughter, the Heir-female.

THIS Objection was branch'd out into several Particulars, according to the several Topicks or Ties, by Virtue of which the Earl's Counsel pretended Earl John was bound up, and restrained from altering the Succession ; For, *imo*, It was insisted upon, That the Clauses of Return in Favours of *Wills*

William First Earl of *Dundonald*, his Heirs and Assigns whatsoever, failing Heirs-male of the Body of *William* Master of *Cochran*, contain'd in the above-recited Contracts 1653 and 1656, and in the Renunciation 1657, had the same Effect with a prohibitory Clause, so as to hinder any Alteration whatsoever in Prejudice of the Order of Succession established in those Deeds. 2^{do}, It was insisted, That even supposing there were no express Clause of Return, yet there being a Substitution in all the Deeds of Settlement, particularly in the Deed 1680, and Contract of Marriage 1684, in Favours of *William* First Earl of *Dundonald*, his Heirs and Assigns whatsoever, failing the Heirs-male of the Body of *William* Master of *Cochran*; This Substitution, as being for an onerous Cause, hindred any Alteration of the Succession, not only in Prejudice of the said *William* First Earl of *Dundonald*, and his Heirs whatsoever; but in short, had the Effect of a prohibitory Clause, so as to bind up all the Heirs, who were to succeed before the said *William* Earl of *Dundonald* and his Heirs whatsoever, from altering the Order of Succession in Prejudice of one another. And, 3^{tio}, It was insisted on, That no valid Title had ever been made up to this Estate, since the Death of *William* first Master of *Cochran*, who died in the 1679; neither *John* Lord *Cochran* his Son, nor any of the subsequent Earls having been served Heir to the said Master of *Cochran*, but having taken a new Right in the 1680 from *William* first Earl of *Dundonald*, who was formerly denuded in Favours of his Son the Master, by the Contracts 1653 and 1656, and who consequently had no Power to grant a new Right; and that therefore the Estate had remained in hereditate jacente of *William* Master of *Cochran* since the 1679, and that the Deed 1680, and all that had followed upon it, were void; and of Consequence, that the last Earl *John*, who was but an apparent Heir, had no Power to make the Deed 1716.

Ansvers.

THESE several Branches of this *Fourth* Objection must be examined separately; and therefore, *imo*, As to the Clause of *Return*, it is contended for the Marquis, That where a Man settles his Estate upon his Heir apparent, & *alioqui successurus*; which failing, to other Descendents according to their natural Order of Substitution; and failing of those particular Substitutes, to return to himself, his Heirs and Assigns whatsoever: That is no more than a simple Destination, and consequently alterable at Pleasure by any of the subsequent Heirs.

THERE is nothing more certain or established in our Law, than the Difference betwixt a simple Destination, and an Entail with a prohibitory Clause as to altering the Succession, and such as contain irritant and resolute Clauses. The first has always been looked upon as alterable at Pleasure; the second alterable for onerous Causes, but not gratuitously; and the third not alterable at all, even for valuable Consideration. Some Difficulties did arise to Lawyers, and not without Reason, how far prohibitory and irritant Clauses, when imposed not by the Superior in Favours of himself, but by the Proprietor, could be effectual, as being inconsistent with the Nature of Property; and those Difficulties were in some measure removed by the Act 1685, concerning Tailies: But it never was made a Question till of late, that an Heir, succeeding in Virtue of a simple Destination, could alter the Substitution and Order of Succession at Pleasure. And if the contrary Doctrine should be once admitted, there can be no such Thing as Property. The Forms of Investitures in Land-Rights require a Substitution: Every Man settles his Estate with such Order of Substitution, as seems most reasonable to him at the Time, even when he inclines to leave his Successors at Liberty to alter according to Circumstances, and as they shall find convenient, relying upon it as an undoubted Rule: That every Man is at Liberty to dispose of his Property as he pleases, upon whom no express Restraint is laid. But if this new invented Law prevail, every Substitution must import a Restraint, and

and no Man can be at Liberty to act as Proprietor, unless there be an exprefs Clause insert in the Investitures, declaring that it is intended the Heirs should be at Freedom to alter as they think fit.

AND 'tis in vain to distinguish in a Case where an Estate is provided to an Heir, *alioqui successurus*, betwixt the last Substitution, introduced by the Words, **which failing**, and that same Substitution, introduced by these Words, **which failing, to return**. Both have the same Meaning, only the one Way of speaking expresses a Circumstance, which the other does not so particularly notice; altho the same Circumstance occurs in both Cases, *viz.* That when a Man cuts the natural Line of Succession to Heirs whatsoever, and provides the Estate, for Instance, to Heirs-male, which failing, to Heirs whatsoever; the first Part of the Substitution is a Digression and a going out (if it may be so expressed) of the common Road of Succession; and the last Part of the Substitution, *to Heirs whatsoever*, is a Return from the By-way to the common Road of lineal Succession: And so when the Substitution is conceived in these Words, *which failing, to return*, that Thing is particularly taken Notice of, that there is a Return, from the By-way to the common Road: And when the Word **Return** is left out, the very same Thing is done; only that Circumstance is not noticed in the Expression, that there is a coming back from the Tailie and broken Order of Succession, to the lineal Course: But the Effect is plainly the same, and no manner of Difference in common Sense betwixt the one Form of Substitution and the other.

It is very true your Lordships have in some Cases made a Distinction betwixt a Clause of Return and a simple Substitution or naked Destination, and have found, That a Clause of Return was not a Substitution, but something stronger, and yet not the same with a prohibitory Clause; and all very justly, if the Lawiers for the Marquis rightly understand the Thing; But then you never did find in any Case where an E-

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state was provided to an Heir, *alioqui successurus*; which failing, to other Heirs, whether called *nominatim*, or by general Designations; which failing, to return to the right Heirs and Assigns of the Proprietor; that ever such Return imported more than a simple Substitution or naked Destination. Indeed where an Estate is given away to a Stranger or Person not *alioqui successurus*, with a Limitation to particular Heirs, such as the Heirs of his Body, or Heirs-male of his Body, with a Provision of Return to the Granter; that has been explained to have the Force of a Paction betwixt the Granter and the Stranger-Receiver of the Estate; that in case the particular Heirs to which the Estate was limited, should fail, the Estate should return to the Granter. And this is most just, because where a Proprietor makes such a Deed, it is evident he is not settling his Succession, but is giving away his Estate from his Successors for a particular Use; but upon Condition, that *causa cessante cessabunt effectus*; when that Use is at an End, that himself or his righteous Heir shall have back that Estate. And this cannot be better illustrated, than from the Consideration of the late Case betwixt the Duke of Douglas and Lockhart of Lee, where this Point was fully debated, and very narrowly examined into. There a Part of the Family-Estate of Douglas, which by several Deeds, particularly a Contract of Marriage in the 1630, was provided to the Heir of a first Marriage, who was the lineal and right Heir of the Family, being given away to the Heir of a second Marriage, and the Heirs of his Body; which failing, to return to the right Heir of the Family of Douglas: Your Lordships did justly interpret, *That that Clause of Return was not a simple Substitution, but was of the Nature of a Paction betwixt the Family and the Heir of the second Marriage, That failing him and his Heirs (for Support of whom alone the Estate of Bothwell was given, or could be given away) that Estate should come back to the Family.* And this Interpretation was supported by the strongest Reasons that could occur,

occur, *1mo*, Because it was obvious the Estate was given for a particular Use, the Support of the Heir of the second Marriage. *2do*, Because every Man is presumed to design no more in or by any Action he does, than what he lawfully can do; and therefore since the Estate was settled and devised by Marriage Articles, to the Heir of the first Marriage, it could not lawfully be given away, except for a rational Consideration, such as the Provision of a Child of a second Marriage might be interpreted to be; and when ever that Cause ceased, the Deed of Consequence came to be irrational: And for that Reason your Lordships very justly explained the Grant in that manner, That the Proprietor had gone no further than the Law allowed him, had given the Estate as a Provision to the Heir of the second Marriage, but had done no more; and that he might not seem to have acted contrary to Law and beyond his Powers, had stipulated the Return to the Family, failing that Use.

Y^{OUR} Lordships then see the strong Reason of that Decision, and at the same Time how it differs from this Case, and from every Case where a Man is settling his Estate upon his own Heir. In all such Cases there is no different Parties pactioning or contracting together. The Settlement is entirely voluntary on the Part of the Maker. He is at Liberty to make the Substitution as he pleases. If he conceive the last Substitution by Way of Clause of Return, this is entirely his own Deed, and is not understood to be the Promise or Stipulation of the Heir. 'Tis no more than a common Expression whom the Proprietor intends should be his Heir, failing such another, still leaving all the Substitutes in their full Right of Property, and Power of Disposal. 'Tis sufficient in this Argument for the Marquis to say, That not one Instance can be given, where a Return in the like Circumstances ever was explain'd in a different Way.

'Tis true the Counsel for the Earl of *Dundonald* did take Notice of other Decisions, such as that, *Drummond contra Drum-*

Drummond, 31. *January* 1679, and the Executrix of *Mortimer* against the College of *Edinburgh*, 10. *February* 1685, and a late Case, *Moffat* contra *Moffat*. But none of all these are at all applicable to the Question in Hand: For, 1^{mo}; They are all in Relation to Sums of Money given in Way of Provisions to Children, and so were Grants for a particular Use; which Use and Purpose being at an End, the Intention of the Party was obvious, That the Sums should come back to the Granters and their lineal Heirs. 2^{do}, The Question never occurred in any of those Cases, whether, if the Persons to whom the Money was first given had left Heirs of their Body, and those Heirs had had Heirs again of their Bodies, and that such Heirs had been possessors of the Money, but afterwards failed, the Money would have returned to the Granter in Prejudice of an Assignment made by the Heirs. If that had been the the Question the Decision must infallibly have gone the other Way; for in those Cases, the Clauses of Return were not properly Substitutions, but Conditions under which the Money was given. It was granted as a Provision, *If they had not Heirs, the Provision was to be extinct; but if they had had Heirs, the Condition would immediately have failed; the Heirs would have had the full Property, and been at full Liberty to dispose of the Money as they thought fit.* And so to apply this to the present Case, whatever Effect the Clause of Return might have had in Way of Condition, so as to hinder *William* Master of *Cochran* to dispose of the Estate to a Stranger in Prejudice of the right Heirs of *William* Earl of *Dundonald*; yet when ever *William* Master of *Cochran* came to have Heirs of his own Body, and that those Heirs came to leave a Succession of other Heirs behind them, the Clause of Return could have no more Force as a Condition, but resolved into a common naked Substitution. And indeed it seems very plain, That this was the true Intention of the Earl of *Dundonald*. Very probably he did not design that *William* his Son, in case he had no Heirs of his Body, should throw away

away his Estate to a Stranger: But if he came to have Heirs who did succeed, and left Heirs behind them, then the Estate was to stand upon the common Footing of other Destinations, without a prohibitory Clause. 3^{to}. There is certainly a very great Difference betwixt a Settlement of Money, or any other moveable Subject, to one, which falling to a Chain of Substitutes, with a Clause of Return; yea, even without a Clause of Return, and a Destination in the Settlement of a Land Estate. The first may justly be interpreted to be a *Fidecommifs*, the other, nothing but a common Destination without any Manner of Trust laid upon the Substitutes; and that because it is a necessary and constant Practice in all Investitures of Lands, to insert a Destination of Heirs, and that in order to prevent a Return of the Fee in some Cases to the Superior, and in others, to hinder its being caducuary, and falling to the Crown, as *ultimus heres*. But in Moveables, it is quite otherwise. 'Tis unnecessary, and an unnatural Thing to tailie Moveables at all, or make any Order of Substitution with Regard to them, except where it is the Pleasure and Intention of the Maker to introduce a *Fidecommifs*. By such Substitution he changes the very Nature of the Subject from being moveable, to be heritable: And so where he makes such a Convulsion in the very Nature of the Right, 'tis impossible to imagine he intended to leave the Institute in the absolute Power of Disposal. The very framing his Settlement in so unnatural a Way, is a full Evidence that a *Fidecommifs*. was design'd.

4^{to}. As to the Case of *Mortimer*, upon which most Weight was laid, 'tis very plain the Return was indeed not by Way of Substitution, but in Form of Provision or Paction, That in case *Calderwood* the Son should die without Heirs of his Body, the Sum should return to *Mortimer* the Mother. There the Mother was not at all Heir, but was a simple Creditor in the Return, by which she could have obliged the Executors of the Son to repeat the Money to her. And just so in *Drummond's* Case; the Granter of the Bond of Provision was real-

ly not Heir to *Margaret* the Child, but proper Creditor, in case the Money had ever been paid to *Margaret*. But, as the Fact happened that it was not paid, the Granter's Heir did not claim the Money as Heir to *Margaret*, but held it in his Hand as not due, the Provision being extinguished and sunk by the Non-existence of Heirs of her Body. And this indeed is the Case of all such Returns in Bonds of Provision; whereas your Lordships see it is quite otherwise in Substitutions in Land-Rights.

YOUR Lordships Decisions in parallel Cases, have gone further in Favours of the Marquis's Side of the Question than 'tis necessary for him to plead at this Time: But since an Argument *à fortiori* is the strongest that can be used, it cannot be improper to take Notice of one or two of those Cases. And, *imo*, Your Lordships will remember the late Case, anno 1718, of *Scot of Tushilaw*, concerning the Lands of *Broadmeadows*, which was thus, *Andrew Scot* of *Broadmeadows* disposed these Lands to *William Scot* his younger Brother, and the Heirs-male to be procreate of his Body, with an express Provision of Return to *William Scot* their Father, and his nearest and lawful Heirs-male and Assigns. And your Lordships will please be informed, That this Return was directly purchased by the Means of *William Scot* the Father, who, in lieu of those Lands given to his younger Son by his eldest, gave that Eldest the Lands of *Tushilaw*.

William Scot the younger, in his Son *Robert's* Contract of Marriage, dispon'd these Lands to his said Son *Robert*, and the Heirs-male of his Body; which failing, to his Heirs-female; which failing, to his Heirs and Assigns whatsoever; and the Competition arose betwixt the Heir whatsoever of *Robert Scot*, and *Walter Scot* the Father's Heir-male, and Heir to the Return. *Walter* founded his Claim upon the Clause of Return, as sufficient to have hindred *William Scot* to have given away the Lands to his Son's Heir whatsoever, in Prejudice of the Return. Your Lordships Found the Clause
of

of Return was no more than a Substitution; and therefore preferred the Heir of Line of Robert in respect William was Fiar, and that there was no prohibitory Clause.

AND here your Lordships can't but observe, how strong the Heir of the Return's Case was. The Land had really been given off to a second Son, as a Patrimony, limited to the Heirs-male of his Body, with a Return to the Father; yet because there was no prohibitory Clause, and because the Lands had once devolved upon *Robert* his Son and Heir-male of his Body, your Lordships found the Destination could be altered, and the Estate given to the Heir of Line, in Prejudice of the Return. And indeed the only Difference betwixt this Case and that of *Forfar*, was, That the Estate of *Forfar* had been provided to the Heir of the first Marriage of *Douglas*; so that they could not be absolutely given away even to a Son, which made the Clause of Return so much stronger; whereas in this Case, *Tushilaw* and his Son were absolute Proprietors of the Lands of *Broadmeadows*; and therefore your Lordships explained the Substitution and Clause of Return, so as to give *William*, to whom they were disposed, the fullest Right the Granter could communicate to him. 'Tis hoped it is obvious, how much stronger the present Question is in Favours of the Marquis.

ANOTHER Decision your Lordships will please notice, is that of *Stewart of Grantully* contra *Sir William Stewart*, decided the 24th of *June 1669*. *Sir William Stewart* granted an Infestment of Annualrent to *Jean Stewart* his Sister, and the Heirs of her Body; which failing, to certain Persons Substitutes, his Brothers and Nephews, and a Part of it to return to himself. *Jean* assigned the heritable Bond to her Brother *Sir Thomas*, who charged *Sir William* the Debitor. And in the Suspension, this Objection was made amongst others, *That Jean could not assign the Bond, in Prejudice of the Substitutes, and of the Return provided to her Brother Sir William*; which the Lords overruled, and found, *That she*

being Fiar might assign. And this Decision is certainly the stronger, that the Subject was Money, given in Form of a Provision; yet because it was secured by Infeftment, and so came near to the Case of a Destination of Land, the Lords found, That the common Rule must take Place; she was Fiar, the Substitution was without a prohibitory Clause, and so she was at Liberty to assign.

YOUR Lordships will also remember the late Case concerning the Estate of *Chatto*, which meets the present almost in every Particular, and indeed destroys the Earl's whole Argument, both on this Point, as to the Effect of the Clause of Return, and others that are afterwards to be noticed. The Case was, *Andrew Ker* of *Chatto* resign'd his Lands in Favour of himself, and *William Ker* his Son in Fie, and the Heirs-male of his Body; which failing, to *John Ker*, Nephew to the said *Andrew*, and the Heirs-male of his Body; which also failing, to return to the said *Andrew Ker*, his Heirs and Assigns whatsoever.

William Ker the first Institute, dispo'n'd the Estate to *Robert Ker* his second Son, passing by *John Ker* his eldest Son, and the Heirs-male to be procreate of his Body; which failing, to *Christian Ker* his Daughter; and accordingly *Robert Ker* the second Son died, without Heirs of his Body, and the Succession was opened to *Christian Ker* the Daughter; and so there arose a Competition betwixt her and *John Ker* her elder Brother, who insisted directly in the same Manner the Earl of *Dundonald* now does, That *Andrew Ker* his Grandfather having settled the Estate upon *William Ker* his Father, in Fie, and the Heirs-male of his Body; which failing, to *John Ker* his Nephew, with a Clause of Return, in Favours of *Andrew* himself, and his Heirs whatsoever: That *William Ker* could not alter that Substitution, so as to give the Estate to his Daughter, in Prejudice of him the eldest Son and Heir-male; and that the Clause of Return to *Andrew* the Grandfather himself, had the Effect of a prohibitory Clause,

more

more especially, considering, That he the eldest Son was the Heir whatsoever to *Andrew*; and so had the Benefit of the Clause of Return, which was expressly conceived in Favours of *Andrew's* Heirs whatsoever. Your Lordships nevertheless, after full Debate, found, *That William being Fiar, and the Substitution nothing else but a naked Destination, might alter at Pleasure, notwithstanding of that Clause of Return*; and so preferr'd *Christian* the Daughter to the elder Brother, who was Heir-male: And indeed your Lordships were unanimous upon this Point of the Import of the Substitution, altho' some few on the Bench had some Difficulty on another Ground, how far *William Ker* was tied down from altering, by his own Contract of Marriage, in Prejudice of his eldest Son, who was the Heir of the Marriage.

AND this leads to another Answer to this Part of the Objection, which the Lawyers for the Earl gave no Satisfaction upon, and which with great Respect to them, they never can be able to remove; and that is, That whatever Effect a Clause of Return may have, with Regard to the Persons, in whose Favours it is conceived, yet such Clause of Return can operate nothing in Favours of the intermediate Heirs, who are called to the Succession, prior and preferably to those Heirs in whose Favours the Clause of Return is conceived. And indeed this seems so plain from common Sense, and the Nature of the Thing, that it can scarce admit of Debate. A Clause of Return taken in the strongest Way, is an Obligation in Favour of the Person to whom the Return is provided, and that Person is Creditor by such Clause; and upon that Title, as Creditor only, can reduce a Deed made in Prejudice of that Return; which Action is founded upon the Act of Parliament 1621. But then, how is it possible, that any Person, who is not Creditor by the Clause, can found upon it, as a Ground of Reduction of any Deed, tho' made in Prejudice of it? Or how much less can an intermediate Heir quarrel a Deed, on Pretence of a Clause of Return, when the Deed

Deed is not in Prejudice of the Return, but on the contrary, is in Favours of the very Person for whose Benefit the Return is provided? And the Application of this Reasoning to the Case in Hand, is obvious at first View. The Earl of *Dundonald* did secure a Return to his Heirs whatsoever, failing the Heirs-male of his Son's Body; and so among the rest, failing this present Earl. Now let it be granted, here was the strongest Security in Favours of the Earl's Heirs whatsoever, yet what is that to the Heirs-male? Is there any Thing thereby stipulate in their Favours? Or is it a tenable Point, that because the Earl took Care to tye down his Son, and the Heirs-male of his Body, that they should not dispose of the Estate to a Stranger, in Prejudice of his Heirs of Line, therefore his Son, or any of the subsequent Heirs-male, could not better the Case of the Heir of Line, and give him the Succession sooner than the Earl had stipulated it to him? This is the very Case. The Marquis of *Clydesdale* is the Heir whatsoever, the very Person in whose Favours the Return is conceived. How then can it be said, that the Deed in his Favours, is a Deed in Prejudice of the Clause of Return? Or that if it be not in Prejudice of it, that the Clause can be made a Title or Foundation upon which to reduce it? With great Submission such Reasoning is intirely incomprehensible.

LET us put the Case, That in Place of the Clause of Return, there had been an exprefs prohibitory Clause, providing, That it should not be in the Power of the Heirs-male of *William* Master of *Cochran*'s Body, to alienate the Estate, in Prejudice of the Earl's Heir of Line, appointed to succeed, failing these Heirs-male; would that prohibitory Clause have hindred the Master of *Cochran*, or his Son, to have given the Estate to the Earl's Heir of Line? Sure this can never be maintain'd.

THE Lawyers for the Earl were indeed pleased to say, That such a Provision imported a general Prohibition, to alter any Part of the Order of Succession. But upon what Foundation of Law this is built, will never be discovered. 'Tis just
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in other Words, That a Clause prohibiting to do a Deed in one's Prejudice, hinders the Person so prohibited, to do a Thing to that Man's Advantage.

They were pleased in the Debate to argue from the Nature of Remainders by the Law of *England*, and from the Statute of *Westminster, de donis conditionalibus*; and to compare those Remainders with our Clauses of Return; and did pretend, that our Clauses of Return had the same Force with a Settlement made in Remainder, according to the Law of *England*.

BUT, in the first Place, This is a very great Mistake. When an Estate in *England* is provided to a Man, and the Heirs, for Instance, of his Body, Remainder to another Person; if that other Person come to succeed, he is not so much as Heir to the first Institute: He takes as by new Grant, and the Provision in his Favours is as strong as an Intail with irritant Clauses is with us. But then *2do*, 'Tis nothing at all to the Purpose; for where an Estate is so devised, there is nothing in the Law of *England* that hinders the first Institute to give the Estate immediately to the Heir in Remainder, excluding the Heirs of his own Body, and that just upon the same Principle now pled for the Marquis, That the Provision in Remainder hinders the first Institute to do a Deed in Prejudice of the Heir in Remainder; but it does not hinder him to anticipate that Remainder, and do a Deed to the Person's Advantage; yea, by that Law, if the first Institute should dispose of the Estate to a Stranger, the Disponee's Title would be good during the Life of the Institute; and until his Heirs failed, and the Heir in Remainder could say nothing to it, until all the Persons failed, who were called to succeed before him.

YOUR Lordships will likewise observe, That this was one Part of the Question in the Case of *Chatto* already cited, only that *John Ker's* Plea was much stronger than the Earl's is. *1mo*, Because there was another Branch, *viz. John Ker* the Nephew, and the Heirs-male of his Body, introduced into the
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Destination betwixt the Heirs-male of *William's* Body, and the Heirs whatsoever of *Andrew*, which made some Way for an Argument, That *Andrew* intended *John Ker* the Nephew should succeed preferably to the Heir whatsoever, and consequently that no Deed could be done whereby to exclude him; and if not to exclude him, then not to exclude those who are called preferably to him: But this had no Manner of Weight, because still he was but a naked Substitute; the Return was not in his Favours. 2^{do}, *John* pretended, That he had the Benefit of the Return, because he was *Andrew's* Heir whatsoever; but your Lordships justly found otherwise, *That he was not the Heir whatsoever, to whom the Return was provided, nor could be, because that Return was only to take Place upon his Failure; and therefore that Christian the Daughter was the Heir whatsoever, in whose Favours the Return was conceived; and consequently that that Clause could never hinder her Father to do a Deed in her Favours, however it might have hindered him to prejudice her.*

IN the last Place, upon this Head, your Lordships will observe, That those Deeds 1653, 1656, and 1657, in which the Clauses of Return were, are entirely out of Doors, since these are not the subsisting Titles of the Estate. They were deserted and altered by the After-Deed 1680, by which the Estate was disposed by the Earl of *Dundonald* to *John Lord Cochran* his Grandchild, with a naked Substitution without any Clause of Return at all. And whatever Objections could be made to this Deed, as not sufficient to convey the Estate, yet sure it had this Effect to convey all Right that was in the Person of Earl *William*; and consequently the Clauses of Return being conceived in his own Favours, this Disposition must have the Effect, at least of a Discharge of such Clauses, which indeed is sufficient of itself to destroy the whole Argument drawn from the Returns; which the Earl's Lawyers seem'd so sensible of, that they were obliged to betake themselves

selves to another Topick ; That every Substitution made to a Man himself, and his Heirs, for an onerous Cause, had the same Force with a prohibitory Clause, and bound up all the Heirs from making any Alteration. And this they endeavoured to support from the Consideration of mutual Tailies, which could not be altered, and from the Decisions already taken Notice of *Drummond* and *Mortimer* ; and in this part of the Argument, dropt entirely the Force of a Clause of Return, and ascrib'd the Inability or Incapacity to alter in all those Cases, to the Onerosity of the Substitution.

BUT, with great Submission, their Argument must fail here, perhaps more than on the other Point : For *1mo*, The Reasoning is intirely contrary to the Foundations your Lordships have gone upon in every Case, where you found there was not a Power to alter a Destination : For you always laid the Stress upon the Clause of Return, as differing from a naked Substitution, taking it for granted, that a simple Substitution was alterable at Pleasure. And so in the Case of *Mortimer* ; the very Words of the Decision as recorded are, *The Lords found the Provision was not of the Nature of a simple Substitution, but was of the Nature of a Provision or Condition, and so could not be frustrate by any voluntar Deed, without an onerous or necessary Cause ; and therefore preferred the Executors of the Mother to the College.* And indeed no Lawyer till now ever argued the Matter in an other Way, but admitted it as a Principle, That a simple Destination was alterable at Pleasure. *2do*, The same Difficulty meets them here, which they could not remove upon the other Point, That supposing a Substitution, purchased, as they are pleased to call it, by a Man to himself, and his Heirs whatsoever, could not be altered nor prejudged ; yet what says that to the intermediate Heirs, who don't fall under that Substitution, and in whose Favours it is not conceived ? Or, how does it follow, that becaule the Earl of *Dundonald* secured that Benefit in a certain Event to him and his Heirs whatsoever, there-

fore the Heirs-male, who were under the Restraint in Favours of the Heirs whatsoever, only could not benefit those Heirs whatsoever, by calling them to the Succession, sooner than they would have come to it by that Substitution purchased in their Favours? It may just as well be pretended, if one should purchase a Right of Succession from a Proprietor, to take Place after that Proprietor's Death, the Proprietor could not give the Purchaser the Estate during his Life.

3710, THE Earl's Lawyers intirely mistake the Nature of a Substitution for an onerous Cause, and so misapply their Reasoning from mutual Tailies. And from your Lordships Decisions, a Substitution is said to be for an onerous Cause, when the Maker of the Substitution gets from another Person, (for Instance, from the Substitute,) a valuable Consideration for making of that Substitution. But that is not the Case here. *William Earl of Dundonald* was the Maker of the Substitution himself. He himself is likewise the Substitute. Where then is the onerous Cause? Who gave it, or who did receive it? Did the Earl of *Dundonald* give himself a valuable Consideration for making the Substitution in his own Favours? They have been pleased to say, very incongruously, *That the Earl gave the Estate for the Substitution*: But sure that is not intelligible; when he made the Substitution himself, and when it was not the Deed of his Son, but his own. Their whole Argument proceeds, as if the Master of *Cochran* had made the Substitution, and had got a Consideration for doing of it. But 'tis plain that is not the Case either in Reality or in Form. He got the Estate in the common Way as other Sons do. The Father made the Substitution what Way he pleased, but purchased nothing from the Son.

WHEN this is considered, their Reasoning from the Case of a mutual Tailie comes to be useless, *imo*, Because in the Case of such mutual Tailies, the first Maker of these mutual Entails gets the onerous Cause performed to him the Maker, *viz.* the Settlement of the other Man's Estate upon him. But,

as is already noticed, there was no Consideration given to *William Earl of Dundonald* for making this Substitution; and so it is intirely out of the Case of a Tailie for an onerous Cause. *2do*, The Question still returns, What was given for making the Substitution in Favours of the present Earl of *Dundonald*? If no valuable Consideration was given or received on that Account, what does it signify that the Substitution was onerous in Favours of the Heirs whatsoever? *3tio*, Even in the Case of a mutual Tailie, suppose one of the Parties substitute the other Party next to the Heir of his own Body; will that hinder him to prefer that other Party to the Heir of his own Body? Sure it will not be pretended.

BUT then the Earl's Lawyers pled, " That there was a valuable Consideration given, by the Contract 1656, to the Earl of *Dundonald*, by *William Master of Cochran*, viz. " the Baronies of *Ochiltree* and *Trabrough*." As to which, *First*, Your Lordships will observe, that this Part of the Argument directly contradicts the former; for hitherto they insisted, *That the onerous Cause of the Substitution was given by William Earl of Dundonald to the Master of Cochran, and that this onerous Cause was the Estate itself, and that with this Estate the Earl purchased the Substitution to himself and Heirs whatsoever.* But now they plead the direct contrary, *That the valuable Consideration was given by the Master to the Earl.* But whether that was given for the Substitution to the Earl's Heirs whatsoever, or for the Substitution to the Heirs-male, they are not pleased to explain, because they run themselves into an Inconsistency every way, state is as they will. For if the Barony of *Ochiltree* was given for the Substitution to the Earl's own Heirs whatsoever, 'tis already sufficiently demonstrated, that this cannot profit the Heir-male, because the Deed now quarrelled is in Favour of the Heir whatsoever. Next, if it be said, That the valuable Consideration was given for making the Substitution in Favours of the Heirs-male, then what could hinder one of those

Heirs-male, when the Estate descended to him, to alter that Substitution ? With great Submission 'tis impossible to make any Sense of this Argument about the onerous Cause, there arise such Absurdities in whatever Light the Thing is placed. But, *3tio*, The giving the Lands of *Ochiltree* was no valuable Consideration at all, because those Lands had been formerly given in the same way by *William* Earl of *Dundonald* to the Master of *Cochran*, in the 1653 ; and all that was done was to change those Lands for *Paisley*, which were much more valuable. If then the Substitution in the Conveyance of *Ochiltree* was not onerous upon the Part of the Earl of *Dundonald*, and that he received no valuable Consideration for it, the Substitution in the Disposition of *Paisley* could never be more onerous, but rather less so ; because the Earl was so far from getting by that Transaction, that he lost more than he gained, since *Paisley* was more valuable than *Ochiltree*. And, *Lastly*, If the Earl had received a valuable Consideration, that might indeed hinder him from altering ; but sure it could not hinder the Master or his Heir from altering, who, according as they state the Case now, was the Person that paid the Consideration, and not he that received it. If a valuable Consideration hinder the Receiver to alter in Prejudice of the Giver, sure it cannot hinder the Giver to alter, altho in Prejudice of himself. Nor is it possible in common Understanding to imagine, how ever a Substitution to Heirs whatsoever, adjected to the End of a Destination, can have any manner of Influence upon the Deeds of *anterior* Heirs-male among themselves, or in relation to one another.

INDEED the Earl's Lawyers endeavoured to obviate this, by stating a Case which directly destroys them. They supposed the very Fact which occurs in the Deed of Tailie 1688, " That there should be a Chain of Substitutes called to a Succession one after other, suppose all Heirs-male ; That after " that there should be a Substitution to Heirs-female, and a " prohibitory Clause or Irritancy imposed upon Heirs-female, " not

“ not to alter the Succession. *And then asked the Question,*
 “ If this would not import a Restriction upon all the *anterior*
 “ Heirs-male not to alter ? ” The Answers are very obvious,
1mo, This is not to the Purpose, because here there is no Ir-
 ritancy at all ; and they don't make it out, that what they
 call an onerous Substitution has the same Effect with a prohi-
 bitory or irritant Clause. *2do*, To state the Case right, they
 should have supposed the prohibitory Clause laid upon the
 Heirs-male, not to alter in Prejudice of the Heirs-female.
 But, *3tio*, Let them state it as they will, there is nothing
 more common than to lay a prohibitory Clause upon Heirs-
 female, and yet to leave the Heirs-male at Liberty. This is
 directly done in the Tailie 1688 ; and wherever it is done,
 such Restraint laid upon the Heirs-female has no manner of
 Influence upon the Heirs-male, nor hinders them to alter in
 Prejudice of the Heirs-female. And were a Restraint laid up-
 on Heirs-male, not to alter in Prejudice of Heirs-female,
 neither would this hinder an Heir-male to alter in Prejudice
 of himself or his Heir-male, or to give that Estate to the
 Female.

YOUR Lordships must be sensible, that if this Reasoning
 hold, there is no Substitution whatsoever, be it never so
 simple, that could ever be altered by a voluntary Deed. Does
 not every Man that settles his Estate, when it is absolutely
 and fully in him, according to any Order of Substitution,
 give his Estate for that Substitution in as proper a Way as the
 Earl of *Dundonald* did in this Case ? Where then shal a
 simple alterable Destination be found ? Not where a Man had
 the absolute Disposol of his Estate ; because in that case he pur-
 chased the Order of Substitution from the Substitutes, accord-
 ing to this new Doctrine ; far less where the Maker was not
 the absolute Fiar, for there he must be regulated according to
 the Restraints that lay upon him.

It is true there was a Distinction made betwixt the Case,
 where a Man resigns the Estate in Favours of himself ; which
 fail-

failing, to his Son, and certain Substitutes, and the other
 Case, where he resigns to himself only in Liferent, and his Son
 in Fee. But where can the Difference ly as to this Question?
 Does a Man that gives his Son the Fee, without any Limita-
 tion, give him less Power than when he gives him the Hope
 of Succession only? What does it signify whether the Es-
 tate descend by Succession, or by Grant, *præceptione here-
 ditatis*, where there is no Restriction upon the Grant? Or,
 what does a Father give his Son more or less, when he
 settles the Estate to himself in Liferent, with an absolute
 Power to dispose, and to his Son in Fee, than when he takes
 the Estate first to himself, leaving the Succession to the Son?
 Or can the Son be called the Maker of the Substitution in the
 one Case more than in the other? As this Distinction is
 without any Difference, and without any Reason, so it is
 directly contrary to the Practice, 'tis believed, in almost all
 the Settlements in *Scotland*, and to every Decision that hath
 occur'd in the Point. That of *Chatto* is direct and opposite to
 it: *Andrew Ker* was the Father, he settled the Estate upon
 the Son in Fee, and to himself only in Liferent. The Case
 of *Tushilaw*, and also that of *Grantully*, are perhaps strong-
 er on this Part of the Argument, because in those no Liferent
 was reserved; and so the valuable Consideration, according
 to the Earl's Reasoning, was greater, and more given for the
 Substitution or Clause of Return.

But then, the Earl's Counsel endeavoured to support all
 by Arguments of Conjecture from the Intention of Parties;
 and the great Stress of this was laid upon the presum'd Design
 of keeping the Estate and Honours conjoin'd. And here they
 call'd to their Assistance the Laws of *Spain*, concerning the
Majoratus of that Country, and the Laws of some other
 Countries, by which Estates anciently were annexed to Di-
 gnities; and some Arguments from the ancient Feus, called
Feuda Gentilitia, and from *Fidecommis. relicta familie*;
 and several other very foreign Examples: And rather than not

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continue to cross their own Arguments, they mentioned Cases in other Countries, particularly in *England*, where the Dignity is annexed to the Estate. They also took notice, that this Substitution of Heirs-male, preferably to the Heirs-female, was contain'd in Contracts of Marriage, particularly in the Earl's Contract 1684 with Lady *Susan Hamilton*; and likewise in the Contract 1706, betwixt the Marquis's Grandfather and Lady *Katharine Murray*. And after all, the Argument was summ'd up in this, That the Favour of conjoining an Estate with Honours was so great, that any Circumstances, from Intention, or from Doubtfulness of Words, might justly be laid hold on by your Lordships to give this Estate to the Earl; If not, to destroy, at least so as to give a Go-by to the known Laws of all Settlements.

But in the first Place, the Marquis does contend, That in such a Case as this there is no Place for Arguments from Intention. Indeed, where there arises a Doubtfulness as to the Interpretation of a Substitution, the Intention of Parties is justly to be considered as one of the great Rules of judging. But where the Question is not as to the Meaning of a Substitution, and where all are agreed who is the Person call'd; but the Debate is upon the legal Effect of such Substitution, so as to limit the Substitute from altering, extrinsec Arguments concerning the Maker's Intention can have little or no Influence. When the Words are understood, the Law determines their Effect. And supposing it were never so clearly prov'd, that *William Earl of Dundonald* design'd his Succession should not be altered, and wished it to be so; yet since he has left it in the Power of his Heirs to counter-act his Intention, and has not restrained them in any legal Way, it signifies nothing what he intended. A Man may intend his Succession should not be altered, and yet may leave it in the Power of his Heirs to do it. And there is a great Difference betwixt intending that the Succession should not be altered, and intending by a simple Destination; which, in Law, imports no Restraint to the

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down the Heir. The several Ways of limiting an Heir are known and established; and if those be not followed, 'tis a *presumptio juris & de jure*, that the Maker of the Deed did not design it. And yet after all, the Argument, in this Case, amounts at strongest rather to this, That it was reasonable for the Earl to design so; and therefore, tho' he has not expressed it any Way, his Intention must be corrected, and your Lordships must make for him a reasonable Will.

For *Imo*, It is said, *He put his Honours and Estate into one Channel*: But what then? He probably had it in his Eye, that the Channel of both Honours and Land might be altered; and therefore, as he could not restrain his Heir as to the one, he did not restrain him as to the other. And after this, altho Circumstances were changed, so as that an Alteration of the Descent of Honours might not be so easily obtain'd, yet the Heir thought it reasonable to give the Estate to his Daughter, without the Honours. Perhaps he differ'd in his Way of thinking from his Predecessor, yet he was not limited. Why then avoid his Deed. It may at least be a Question, whether one should prefer that Shadow of a Title of Honour, to the near Connection that is betwixt him and his own Child. *2do*, It was so far from being the Intention, even of *William Earl of Dundonald*, to make the Estate descend unalterably to Heirs-male, that he not only imposed no Restriction; but on the contrary, he is a Witness, Doer and Consenter in Deeds, where his Heirs are reserving and asserting their Powers, to alter at Pleasure, yea, he himself passing from all Limitations upon them, to the effect they may enjoy the Estate, and have it at their Disposal absolutely. It is unnecessary again to repeat the Clauses. There is an express Power reserv'd in the Contract 1684; and in that Contract, as well as in the separate Renunciation granted the same Year, *William Earl of Dundonald* renounces his reserved Powers to that Effect, and for that very Reason express'd, That his Grandson might have the Estate absolutely in him; and consequent.

sequently, he was not to be under so material a Restriction, as not to have a Power to alter the Succession.

It is true, The Earl's Lawyers endeavoured to explain away the reserved Powers in this Deed 1684, *That it was only to alter for onerous Causes*: And altho' the Words are express, *for other Causes whatsoever*, yet they told us, *this would prove too much, since it would import a Power to alter, even in Prejudice of the Heirs of the Marriage.*

BUT 1^{mo}, The Words are express, To contract Debt, or dispose for onerous Causes, or any other Cause whatsoever, except that of preferring the Children of a second Marriage to those of the first. 2^{do}, It is no Absurdity to say, That my Lord had a Power to alter, even as to the Heirs of the Marriage, excepting in Favours of the Heirs of another Marriage, because there was no Ground to fear such Alteration. But 3^{tho}, The Reservation is a Power of altering, and Disposal as Fiar by that Contract of Marriage; but his Power, as Fiar by that Contract, could not empower him to prejudice the Heirs of the Marriage, and so the Argument does not go too far, but is concluding, according to the very Words of the Clause. And the same Observation holds with regard to the Contract 1706; where, altho' by Influence of an Heir-male Curator, the Destination runs wide to Heirs-male in an extravagant Manner, yet there is the strongest Power of Alteration reserved, that possibly could be devised, and the Power accordingly exercised by that same Earl, by the Deed 1716.

AND in the Last Place upon this Head, However Destinations made in Contracts of Marriage, to Heirs-male of the Marriage, might hinder the Contracter from prejudging the Heirs of that Marriage, yet it neither could hinder him to alter, as to other Substitutes not Heirs of the Marriage, nor hinder an Heir-male of the Marriage, to whom the Estate might afterwards descend, to alter at his Pleasure.

It is unnecessary to make any particular Answer to the Arguments from the *fideicommissis*, given according to the

Rules of the common Law *familia*, or to a particular Person *familia causâ*, or from the *feuda gentilitia*. Those Arguments were very proper Imbellishments in a Pleading, but can't have great Weight in this Determination of a Question, where the Rules of our own Law are settled and established, and where Experience has brought us to a fixed Point in those Matters, without being left to wander amongst uncertain Conjectures. It is now fully settled, what is the Import of the several Clauses made Use of in our Destinations of Land-rights. Every Maker of an Entail is presumed to know the proper Clauses, fitted for restraining the Powers of the Institute or Proprietor, as to the altering the Succession, or disposing of an Estate. No Doubt a *fideicommiss*. left to a particular Person *familia conservanda causâ*, imported a Restraint upon him, not to alter to the Prejudice of the Family. But we are not left to such an uncertain Kind of Settlement: Our Law hath determined the Manner of continuing an Estate in a Family, to be not by a doubtful *fideicommiss*. but by Clauses prohibitory and irritant. Arguments from the *feuda gentilitia* are yet less to the Purpose in these Cases. The Superior's Interest, who was the Giver or Donor of the Feu, and his Intention, was the Thing that intirely regulated the Succession. If he gave away a Feu, out of particular Favour to one that served him well, unto his Family, and no further; that was a proper Limitation, whereby to make the Vassallage become extinct, failing of that Family, and to restrain the Donée from giving the Estate to another. But all that is nothing to the Case. So far our Law hath debarred it from the ancient Manner of Feus, that now the Will of the Vassal predomines. He can in most Cases dispose of the Estate as he pleases, without great Regard to the Superior; and, as has been often said, his Will must be regulated according to the Forms the Law has established, and still we return to the Point first stirred betwixt us: What is it in all those Settlements, that according to the Rules established by our Law, does make it appear, That the
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Earl of *Dundonald* even intended, that his Estate should descend unalterably to the Heirs-male? Were it needful to talk more of the *feuda gentilitia*, it might serve for a full Answer to say, that even the strictest Rules, according to the Nature of those Feus, did by no Means hinder the Vassal to give the Estate to the nearest Heir of the Family, or Heir by Blood, or Heir of Line (which our Competitors please) in Preference of the remoter Heir-male.

THE Marquis shall now proceed to the third Branch of this fourth Objection, against his Grandfather's Power of making the Deed 1716, viz. the pretended *Discontinuance of the Titles, by Reason of John Lord Cochran's not having serv'd Heir to William Master of Cochran his Father, but accepted of the new Conveyance in the 1680, from the Earl his Grandfather.* 3d Branch of the 4th Objection.

AND as to this 'tis answered for the Marquis, *imo, Answer.* That the Rights made to *William Master of Cochran* by his Father, were not fully compleated, no publick Infeftment, but a base Sasine only, without Possession, had followed upon them; besides, that the Earl had not fully acquired in the Rights to the Estate in his own Person; and therefore, since those Titles were not compleated, but that the *dominium directum*, yea in effect the whole real Right remained with Earl *William* the Granter; and that *John Lord Cochran* was himself the Heir, and only Person, to whom the Right of those base Infeftments could devolve, and who could compleat those Titles, or take up the Possession by Virtue of them: It was optional to him, either to connect a Right to those Titles; and to insist against his Grandfather to compleat them, or to neglect those Titles, which remained so lame and incompleated, and to take a split-new Right from his Grandfather, in whom the radical Right and *jus nobilius* still continued. And since he chused to do so, and did compleat that new Right by a publick Infeftment, no other Heir coming after him can set up those defective Titles, in Opposition to the new Right 1680; which being granted, as said is, to

the same Person, who was Heir to those incomplete Titles, did intirely absorb them, and render them useless.

AND for illustrating this, your Lordships will please consider, That by the Death of *William* Master of *Cochran*, the Procuratory of Resignation, according as the Law then stood, was fallen and become useless: So that there was no other Way possible to complete the Titles, but either by obtaining a new Procuratory from the Earl of *Dundonald*, or by adjudging from him; and if *William* Earl of *Dundonald* had died before granting such Procuratory, or the passing such Adjudication, then *John* Lord *Cochran* his Grandchild must of Necessity have served Heir to *William* Earl of *Dundonald*, in order to have made up his Title, or fallen upon some other bout-gate Way, to have drawn the Estate out of the *hereditas jacens* of *William* his Grandfather. And if it had been possible, according as the Forms then stood, for *John* Lord *Cochran* to have made up a Title to the Procuratory of Resignation, or had he made up the Title to the dispositive Part of the Right, and insisted against *William* Earl of *Dundonald*, to complete it in his Person, and had obtained a new Procuratory from him; the Moment such Procuratory was executed by Resignation and Infeftment upon it, that Moment the inferior base Right was sunk and absorbed by completing this *jus nobilius* or paramount Title. And if *John* Lord *Cochran* had insisted in a Process against *William* Earl of *Dundonald*, for completing the Titles in the Person of him the Grandchild, the Earl could not have objected that he was not served Heir to the Master of *Cochran* his Father. Or the Answer would have been good, That Earl *William* himself being Superior of that base Right, so far as it was at all made real, he was at the same Time obliged to do every Thing necessary for completing of the Titles, and consequently to grant to his Grandchild both Precepts of *clare constat*, and a new Procuratory for completing the publick Holding.

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to the new Right 1880; which being granted, as it is to the

And since this was the Case, That the Earl could have been obliged by a Process, to have done every Thing that was done, and to have granted that new Right in the 1680, it was in vain to use so many Bout-gates, where the Thing could be directly done. And since the Earl was willing, without Compulsion, to do what the Law would have compelled him to, no more was required but to take a new Right, and that being accordingly completed, the former is absorbed: And there is no Manner of Defect or blank in the Title, but a very plain well connected Progress.

AND tho' this Reasoning must hold absolutely, altho' both the base Infeftments 1653 and 1656 had been completed *in suo genere*, particularly by Registration and Possession attained, so it holds much stronger; first with Regard to the Lands now in question, that ly in the Shire of *Renfrew*, and that are contained in the Deed 1653, and not in the Deed 1656, because the Sasine upon that Deed 1653 was not registrate in the Register appointed for the Shire of *Renfrew*, but only in the Shire of *Air*, within which other Lands lay, not now in Dispute; And altho' a Sasine not registrate, would have been good against the Heir of *William* Earl of *Dundonald*; yet as to the Heir of the Master of *Cochran*, it was good for nothing: Such Heir never could have made up a Title to it, or to the Land any other Way, than by obliging *William* Earl of *Dundonald* to have granted a new Precept without Regard to that void Sasine. And as to the Sasine upon the Contract 1656, it was in effect personal, since no Possession was obtained upon it, as will be more particularly touched hereafter. But supposing it had been completed *in suo genere*, still the former Reasoning holds. It was but the *jus ignobilis*; it belonged to *John* Lord *Cochran* the Grandchild, as Heir, to whom the Obligation upon the Grandfather to complete the full Title did devolve; which he did, and thereby destroyed all lesser Interests falling to the same Person.

THE Analogy of your Lordships Decisions goes a great deal further upon this Point. You have sustained a Wife's Right to a Terce, and a Husband's Right to the Courtesy of Lands, where the Husband or Wife were infest upon a void Title; upon this very Foundation, That, tho' the Infestment might be quarrellable, yet the Husband or Wife, as they were Heirs to the bad Infestment, they were likewise Heirs to the good one; and therefore, altho' they possess by Virtue of what perhaps was the most lame, no Heir could quarrel that, because they might have taken up the good one; and it was the same Thing by which they possess, since the Line of Descent was one and the same in both. 2do, You have found, That an apparent Heir of an Investiture, tho' not actually entred, yet might discharge the Reversion of an Apprising or Adjudication, so as to bar every After-Heir from quarrelling it. 3tio, you have found, That an Heir, who was Heir to an Estate, discharging the Reversion of an Apprising, or suffering a Decree of Expiry of the Legal to go against him, even where the Apprising or Adjudication was very defective, yet if he afterwards acquired it, and made it the Title of his Possession, that was good against after Heirs. These Things were determined lately in the Cases of *Linton* against *George Blair*, and of *Mader* against *Mader*; which no Doubt your Lordships will remember. And there is yet another Case better known, and which cannot easily be forgot, and that is the Case of the Estate of *Kincardine*; that Estate, 'tis believed, your Lordships all know, was sold for the Debts of Earl *Alexander*, upon whose Titles the Right of the Purchaser, and so many Creditors stands. Earl *Alexander's* Title was not by Service to his Predecessors, but by an Apprising led against his elder Brother *Edward* the undoubted Proprietor; which Apprising was liable to many Objections. The Grounds of it were lost; it self satisfied by Intromission; numberless Nullities in it. Yet since Earl *Alexander* had acquired it, and made that the Title of his Possession, when at the same Time

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he was the apparent Heir of the Investiture, your Lordships would not allow Earl *Alexander's* Sons to pass by that Right, or to take up the Right of Earl *Edward* his Uncle against it.

But the present Case is infinitely stronger than all these: Those Titles were somewhat inconsistent with, and at best, but collateral one to another. Here was only a lame Title, which required a new Deed of Earl *William's* to complete it: It belonged to his Grandson; he, without putting him to any Trouble, fully completed the Right. Where is the Defect in such a Case? And here it may be further observed, That the Conveyance in the 1680, being granted to the Heir in those Deeds 1653 & 1656, in Pursuance of the Obligations contain'd in those very Deeds, the Disposition itself, granted to *John Lord Cochran* the Grandchild, was of equal Strength with, and did import a Precept of *Clare constat*, when it proceeded from the same Person by whom such a Precept fell to be given.

The Lawyers for the Earl made no other Reply, but that we had certain Forms of connecting Titles, and that those Forms must be observed, otherwise our Records would be defective. But this can have no Weight: Forms are to be observed when necessary, but not when useless. In this Particular, there was no Occasion for such Forms; and it makes no manner of Blank in our Records, but on the contrary, every Body that looks into them must see, that the first Investments were but base, flowed from Earl *William*, and by Course did descend to *John Lord Cochran*; and consequently, that the Completing the Titles by the same Earl in the Lord *Cochran's* Person, which they likewise see in the Record, was agreeable to, and no more than a full Implement of the first Deeds.

The *Second* Answer made for the Marquis to this Branch of the Objection, was, That these base Investments 1653 and 1656, never having been cloathed with Possession, as 'tis plain they were not, nor could not be; since they were only to
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take Effect after Earl *William's* Death, who survived the Mar-
 ster of *Cochran*, to whom they were granted, of the posterior
 Infestment 1680 being publick, and having attained Posses-
 sion, the same was preferable, both by constant Practice, and
 by the express Statute *Anno 1540*, intituled, *Provision and*
Paines of them committand Fraud in Alienation, or other
ways. By which Statute it is appointed, "That where any
 " Person is put in private State of Lands, (as the Act calls it)
 " not by Confirmation or Resignation; and that another Per-
 " son gets thir Lands, and bruiks the same peaceably for
 " Year and Day, by Labouring, Manuring, &c. and swa,
 " kend heritable Possessor thereof Year and Day; the Per-
 " son and Persons having private State and Sasine of the said
 " Lands, shall never be heard to claim the same against the
 " second heritable Possessor, for ony Cause, &c." The Mar-
 quis's Claim then is founded in the Words of the Statute.
John Lord Cochran got the Estate; he and his Successors
 have been possess'd more than Forty Years, in place of one:
 And so the base Infestments are out of Doors.

THE Earl's Counsel made no other Answer to this, but,
 " That *William Earl of Dundonald* his Liferent being re-
 " served, his Possession, as Liferenter, cloathed his Son's
 " base Infestment with Possession." But, with great Submis-
 mission, this is incongruous: Your Lordships have found,
That an Infestment by a Father to his Son was not clad with
Possession by the Father's Possession, altho he had a Factory
from his Son, 10. July 1669, *Gardener contra Colvil*. And
 however it might be pretended, That if a third Party should
 denude himself in Favours of one in Liferent and another in
 Fee, upon which Deed a base Infestment should follow, that
 in such Case the Possession of the Liferenter would cloath the
 whole base Infestment with Possession, because the Liferent
 and Fee are one and the same Right, originally constituted by
 one Infestment: And because the Liferenter had no other In-
 festment in him, and so every Person enquiring into the Titles
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of the Liferenter's Possession, could ascribe it to no other Title than that Infestment; yet it is quite another Thing, where a Father is infest in the Property, then infests his Son in Fee, with a Reservation of his own Liferent, and continues his own Possession: For there his Possession is not by Virtue of his Son's Infestment, but by Virtue of his own Right which he hath reserved, in so far as concerns his own Liferent and Possession; and so that Possession of the Father's does not lead any Person whatsoever to find out the Infestment of the Son. Having seen the Father originally infest in Fee, they naturally ascribe his Title to that, and enquire no further. But indeed the Matter in this Case does not hang upon a *bona fides*: 'Tis the Nature of the Thing determines the Question; where a Father reserves his Liferent, his Son's Infestment is not at all his.

A *Third* Answer to this Branch of the Objection, was, That the Conveyance 1680 proceeded upon the Recital of the full Powers had been reserved to Earl *William* the Grandfather, to dispose of the Estate at Pleasure; which Powers, tho not appearing now in the Body of the Infestments, yet Law presumes they had been reserved either by Back-bond or personal Faculties: And that those Powers having been expressly acknowledged and admitted by *John* Lord *Cochran*, the only Person who was prejudged by such Powers, his Acknowledgement is sufficient Proof, that such Powers really were against every succeeding Heir; and the rather, that the Back-bonds or Writings, in which those reserved Powers might be contain'd, fell to be given up and destroyed at the Time when Earl *William* discharged and renounced them. And that such Powers were acknowledged is plain, not only by the Acceptance of the Conveyance in the 1680, in which they are narrated, but by the Contract 1684, which is a mutual Writing, and so a direct Acknowledgement under Earl *John's* Hand, that such Powers were; and which is further acknowledged

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by the Acceptance of the particular Discharge and Renunciation granted in that same Year 1684.

THE Reply made to this seem'd to be, " That it was no great Wonder to see the Acceptor of a Right, *à non habente*, acknowledge the Right of the Granter; and that it did appear by the Contract 1684 itself, Parties were sensible, That Earl *William* had no such Powers, because *John* Lord *Cochran* became obliged to procure himself infeft as Heir to his Father in such Lands wherein his Father died infeft; and in which *William* Earl of *Dundonald* had no Power of Redemption or Disposal."

BUT this can never give any Satisfaction. If *John* Lord *Cochran* had been taking a Right to himself, *à non habente*, in Order to exclude another Right which he could not come at, then indeed it might be said, That his Acknowledgement of the Granter's Power signified nothing. But the Earl does not notice, that the other Right now pretended to be set up, was *John* Lord *Cochran*'s own: Why then would he acknowledge the Powers of the Granter, either to the Prejudice of his own Right, or to no purpose at all, contrary to Truth, when if he had not known there was such Powers, he would have taken up the absolute Right, without demanding such Renunciations from his Grandfather? *2do*. How is it possible such a Work could be made about Powers of Redemption, and taking Renunciations, if the Contract 1656 had not been qualified with Back-bond, or some personal Faculty? For your Lordships will observe, That the Faculties in the Contract 1653 were already discharged by the Contract 1657, and the Marquis hath no Use for any reserved Powers in Earl *William*, in Order to support the Conveyance 1680, in so far as concerns these Lands. It is plain by all the Deeds, that such Powers are acknowledged to have been in the Earl; they must have been by Back-bonds or personal Faculties, since they don't appear ingross in the Infeftments. *3tio*, Altho those Acknowledgments would not be a Proof against a singular Suc.

Successor, or perhaps against Creditors of *William* Master of *Cochran*, yet sure they were probative against *John* Lord *Cochran* the Grandchild, and consequently against all succeeding Heirs. 4^{to}, The Observation, That *John* Lord *Cochran* was obliged to make up Titles to the Lands in which his Grandfather had no Power of Redemption, is a strong Confirmation of what is pled for the Marquis, because there were some such Lands to which he actually did make up Titles. But as to the Bulk of the Estate, he made up no other than what were then in him by the Conveyance 1680; so that the very Distinction made in the Contract, and in the completing the Titles, shews, That Earl *William* had a Power of Redemption or Disposal as to the Bulk of the Estate, to which therefore Lord *Cochran* made up no Title other than the Deed 1680, so often mentioned. And all this is confirmed by a 40 Years Possession upon the same Title, and is still the stronger, that these Rights have been acknowledged by so many different Heirs, who all might have made up a Title to the absorb'd deserted Titles now set up, had there been any Reason for so doing.

AND this leads to the *Fourth* and separate Answer, which is *Prescription*. That the Estate having now been possessed by Virtue of the Infeftments 1680, there is a positive *Prescription* established, which impowered Earl *John* and the last Earl *William*, upon the Footing of those Titles, to dispose of the Estate at Pleasure, and likewise a negative *Prescription*, against the pretended separate Settlement.

THE Replies made for the Earl were, 1^{mo}, " That there
 " could be no Prescription of the Deeds 1653, and 1656, be-
 " cause the Right of those Deeds belonged to the Earls them-
 " selves, who were in Possession, and so their Possession might
 " be ascribed to their Right of Apparency, as well as to
 " the Infeftment 1680. 2^{do}, That the negative Prescription
 " could not run, because the present Earl was *non valens*
 " *agere*, until the Succession devolved upon him, or at least

“ until his Father's Death.” And they further pled, which indeed is not very well understood, “ That the present Earl's own Minority would fall to be deduced from the Prescription. 3th, That the Prescription could not run, during the Life of *William* Earl of *Dundonald*, whose Eiferent was reserved.”

BUT neither do these at all seem satisfying; for that, 1^{mo}, Altho it be true, That *John* Lord *Cochran*, or any other Heir having different Rights in his Person, might ascribe his Possession to either of those Rights, in Opposition to a Third Party; and that his Possession might be ascrib'd to either of them, if he himself had not determined which of those Rights he possess'd by Virtue of: Yet in this Case he and all the succeeding Heirs have declared what Right they possess'd by, viz. The Right 1680, upon which they have been infest, retourn'd upon that Right, and made Deeds as heritable Proprietors, not upon the Title of apparent Heir. And here the Lawyers for the Earl seem'd to be brought into a Kind of *Dilemma*; for either the Conveyance 1680 is agreeable to the former Deeds 1653 and 1656; and towards the further implementing and completing of them, which seems plainly to be true: And in that Case there is no Occasion for a Prescription; the Progress is one, and regularly continued. Or else the Infestment 1680 is inconsistent with the former: And in that Case, when *John* Lord *Cochran* and his Heirs, have declared they possessed by Virtue of the inconsistent Right, no Body can pretend to ascribe their Possession to the other which they plainly deserted and disclaimed. 2^{do}, An Heir having different Rights, may in Defence of himself ascribe his Possession to any Title he pleases, even in the Case where he had made no Election: And therefore the Marquis, the last Earl, and Earl *John* the Grandfather, may ascribe their Possession altogether to the Deed 1680, in Opposition to any Person whatsoever, who pretend to debate their Right of Property upon the Foundation of any other Title. 3th, The Marquis, in order

der to the Determination of this Point, desires only to be resolved of this plain Question, whether *John* the first Earl of that Name, and his Successors, having possessed in Virtue of the Infestment 1680. till after the 1722. yea, to the 1725. without acknowledging any other Title; would not a Deed of Conveyance by them to a Stranger been supported by the positive Prescription, in Opposition to any Third Party, who might pretend to reduce that Deed? If the Words of the Act of Parliament be good for any Thing, it is very plain such Deed must have been supported. The Words are, *That whosoever his Majesty's Lieges, their Predecessors and Authors, have bruiked heretofore, or shall happen to bruik in Time coming, by themselves, their Tenants and others, having their Rights, their Lands &c. by Virtue of their heritable Infestments made to them by his Majesty for the Space of 40 Years continually, and together, following and issuing the Date of their said Infestments, and that peaceably, without any lawful Interruption made to them therein, during the said Space of 40 Years, such Person shall not be unquieted by any other Person pretending Right to the same by Virtue of prior Infestments, publick or private, nor upon any other Ground, Reason, or Argument, except Falshood allenary.* And afterwards follows a Declaration, *That Years of Minority shall not be counted in the Course of the Fourty Years.* Nothing can be plainer, than that the first Earl *John* and his Successors have possess'd in the direct Words of that Law, without any Interruption made; where then is the Foundation for quarrelling that Prescription? Not indeed upon a Fact but an Argument. The Law hath excluded even Arguments in that Case.

NOR does it at all better the Matter, That no Body could interrupt but the Earls themselves who possess'd. If it be so, so much the better. The Presumption is the stronger, that the only Parties having a Concern, agreed the Prescription should go on upon the Footing of those Titles. It was in the Power

of every one of the Earls to have interrupted the Possession, by taking himself to the other Title. They did not think fit to do it. Sure the Prescription is not the weaker, That there was not only a tacite Consent, but an expresse Consent to the Prescription, by those who had the Power to interrupt.

AND as to the second Part of the Reply. *That the Earl was non valens agere, because the Right of Succession was not devolved to him.* imo, By the Act of Parliament, this seems to be no Objection to the positive Prescription; and it is absurd that it should, otherwise the Records can give no Security. Persons can see who are in seise, and who in Possession; but they never can know who are *non valentes agere*. And indeed that Objection seems to be competent by our Law, against the negative Prescription only, not against the positive. But, *next*, The Maxim is intirely misapplied; for if it be not, there can never be a Prescription to the World's End. Any Heir starting up at the End of a hundred Years was in this Sense not *valens agere*. The Succession was not devolved upon him: The Fault was his Predecessors, and not his; and Nonexistence would for sure be the strongest Incapacity that could debar any Heir. But this is not the Meaning of the Law. The Incapacity must ly upon the Person to whom the Right does or might belong, during the Course of the 40 Years; and therefore if those Persons to whom the Right belonged during that Time, were in a Capacity to have interrupted the Prescription, there is no Place for the Maxim. In this Case all the Earls of *Dundonald*, from the 1680, were in a Capacity to have interrupted. It is true they chused not to do it; and so much the stronger is that Prescription, when it is fortified by an expresse Consent, as well as by a Negligence or Inactivity for so many Years.

AND as to the Minority of the Earls who were in Possession; nothing indeed was pled upon it, because the present Earl's Lawyers were sensible, That Minority could not hinder the Prescription to run in Favours of the Minors, however
it

it might have operated, if the Prescription had been running against them.

AND as to the Preference. That the present Earl's Minority fell to be deduced, it cannot well be understood. Their Minority alone is to be noticed, who stand in the Right, or are at the Time Heirs apparent: But the Earl had no Right, nor was Heir apparent till after the Death of the last Earl, and so after the Prescription was run.

AND in the *Last Place*, upon this Head of Prescription, there seems to be no Foundation for the Claim. That the Years of *William* first Earl of *Dundonald* his Life should be deduced, because his Liferent was reserved by the Contracts 1653 and 1656: For *imo*, He was infeft in the Years 1699 and 1662 publickly, in most of all the Estate, by a Charter to himself and his Heirs whatsoever, which was inconsistent with the Settlements in the Deeds 1653 and 1656; and therefore it may be, and is contended, that the Prescription begun even from the 1662; for from that Time, it was competent to the Heirs-male to have quarrelled that Infeftment, made to the Heirs whatsoever, and either to have reduced it, or to have obliged Earl *William* to demode. And since that was not done, every Purchaser from the Earl of *Dundonald* can found upon his Possession from that Time, to compleat the Prescription in their Favours, and are not concerned to enquire what Liferents were given or reserved by former Settlements. There is a Charter and Sasine absolute, which is all the Act of Parliament requires; and now there is a Possession for upwards of Sixty Years in Consequence of it.

In the *Next Place*, Supposing the Possession were only to commence from the 1680, the Years of the Liferent are not to be deduced, because it was in the Power of *John*, then Lord *Gorham*, to have interrupted, by not accepting of that Deed, and by betaking himself to the former Deeds 1653 and 1656. But this he thought not fit to do, but both Earl *William* and he possessed upon the Footing of the new Conveyance.

veyance, the publick Infestment reserving Earl *William's* Life rent; so that in Place of his Possession being deduced, it expressly accretes to the Conveyance 1680, as being in Virtue of the same Infestment.

THERE is yet a separate Point that was insisted on for the Marquis, which, tho' founded in Law, and in your Lordships Decisions, 'tis hoped there will be no Occasion for. However, since it was the Subject of Debate, it ought likewise to enter into this Information; and that arises from the Act of Parliament 1695, by which apparent Heirs, passing by another Heir, who had been three Years in Possession, is obliged to fulfill the Deeds of the intermediate Heir, whom he passes by. From whence the Marquis insists, That if this present Earl could pass by the Heirs, who have been interjected betwixt him and *William Master of Cochran*, he must implement their Deeds, particularly the Deed 1716, the Deed of Tailie 1688, and the Contract of Marriage 1684, as a Support and Foundation for these two other Deeds.

THE short Objection made by the Earl to this, was, *That the Act did not relate to Deeds of Succession, but to onerous Deeds, or Deeds in Favour of Creditors. And 2do, That the Earl had not yet serv'd to William Master of Cochran, nor pass'd by the interjected Heirs.*

BUT 'tis hoped, the Replies are as plain as these Objections are short. For 1mo, The present Earl is not yet served, but claims the Estate, as Heir to *William Master of Cochran*, and hath agreed to dispute the Point of Right upon the same Footing, as if he were actually served. 2do, The Act of Parliament is opposed, which mentions expressly Deeds as well as Debts, without Distinction betwixt onerous Deeds, and those that are voluntary. And your Lordships have very lately explained the Law in this Manner, in the Case betwixt *Muirhead of Park*, Heir male and the Heir female, where you found, *That a Deed of Settlement, made by an apparent Heir in his Contract of Marriage, fell under the De.*

Description of this Act, and was to be implemented by the next Heir. And if it shall be said, That Settlements contained in a Contract of Marriage are onerous, and are to be differenced from other Settlements, the Lawyers for the Marquis, tho' they find no such Distinction in the Act of Parliament, yet for once they may admit it, because the first Settlement he claims to be implemented, is the Contract of Marriage 1684; which, altho' it does not contain a Substitution in Favours of the Heirs whatsoever, yet it contains an expresse Reservation and Power to *John* Earl of *Dundonald*, to dispose of that Estate for any Cause he pleased, one excepted. If then this Deed once be implemented, or that this Earl is obliged to fulfill it, it must be in such Manner, as to operate *retro* in Favours of the said *John* Earl of *Dundonald*, and of *John* his Son and Heir of the Marriage; whereby their Power of disposing of the Estate at Pleasure will be supported, as well as the Power of *John* Lord *Cochran* himself; and so both the Tailies 1688, and Deed 1716, must stand firm in Favour of the Marquis.

AND this leads to another Consideration upon the Subject of that Deed 1688, which might have been properly enough brought in, after the Arguments that have been used in Support of the Deed 1716, but yet will perhaps be as well understood, when taken Notice of in this Place, and that is, That supposing the Deed 1716 were out of Doors, yet the Marquis of *Clydesdale* has Right to the Estate, in Virtue of the Entail made by Earl *John* anno 1688; whereby, failing the Heirs-male of his Body, the Estate is expressly devised to the Heirs-female.

AND if it be said, That this was altered by the Marriage-contract of the last Earl *John* anno 1706. It is indeed true, That the Substitution differs in those two Deeds; but then what the Marquis contends, is, That the last Earl *John* not having vested in his Person that Right or Deed of Entail 1688, but having gone on, without implementing and perfecting that

that Deed, to possess as Heir, upon the Footing of the Investiture, that Entail remained as an Obligation upon him, which he and all his succeeding Heirs were obliged to fulfil; and so can be taken up at this Day against this present Earl of *Dundonald*, and Implement sued upon it, in the same Manner as could have been done against any of the Heirs, who have succeeded since that Deed was made. And altho', if the last Earl *John* had once served himself Heir to that Entail, he might have altered it, because indeed the Irritancies therein contained are not laid upon him; yet in the *first* Place, he must have served Heir to it; for no Heir can alter a Right of the Substitution contained in it, tho' he have a Power of Alteration by the Deed it self, untill once he vest himself in the Right of that Deed. The Power of Alteration arises from his being in the Fie of such a particular Settlement, but without first being in the Fie, he cannot alter. And tho' it was pretended, That none of the Heirs accepted of that Entail; that signifies nothing; it lay as an Obligation upon them, which they could not repudiate, and any After-heir can take it up, and oblige them to fulfil it.

UPON the Whole, The Marquis of *Clydesdale's* Claim to the Succession of this Estate is well founded, in Virtue of the Deed 1716. That Deed was not revokable by the last *William* Earl of *Dundonald*; nor did he revoke it while he remained in Capacity to do it, but on the contrary did acknowledge it, and executed and delivered the Procuratory 1722 in Implement of it. The Revocation and new Settlement 1725 can signify nothing, as being made in Minority on Death-bed, authorised by Curators acting in Favour of themselves, and made when the Granter was incapable of knowing the Import of any Deed.

EARL *John's* Power to make that Deed 1716, is fully supported by the Investments in the 1680, confirmed by a Prescription. The lame, incomplete or deserted Rights made in the 1653 and 1656, cannot now be taken up by a succeeding Heir,

Heir, to defeat that Title, by which the first Earl *John*, Heir to the whole Deeds, chused to possess the Estate, as the most solid and unexceptionable Right. The first Earl *William's* Powers to make that Settlement 1680, in Concurrence with the Lord *Cochran* his Grandchild, are plain, both by the Nature of the Rights as they then stood, and by Virtue of the reserved Powers, which Earl *John* acknowledged were in him. There is no prohibitory Clause in any of those Deeds that could hinder the Heirs-male from settling the Estate upon the Heir-female. There is no onerous Substitution in those Settlements, that can supply the Want of a prohibitory Clause: Nor can the Heir-male found upon any Clause of Return or Substitution, in Favours of the Heir whatsoever, as a Title or Foundation to reduce Deeds made in Favour of that very Heir-female. The assumed Arguments of Favour, for conjoining an Estate with Honours, is no Reason for overturning the Forms of known Settlements, and can't authorise your Lordships to make a Settlement for that Purpose, different from what the Earls of *Dundonald* have left behind them.

AND therefore since the Law is to be the Rule, and the Will of the Makers of those Settlements, as they have reveal'd it, not their secret Intentions; 'Tis hoped there is little Doubt, That this Case will be determined in Favour of the Marquis of *Clydesdale*, and his undoubted Right to the Succession to the Estate of *Dundonald* confirmed to him by the Authority of your Lordships Judgment and Decree.

RO. DUNDAS.

COPY

C O P Y Disposition of Tailzie, the Earl of *Dundonald* to his Children.

W^E John Earl of Dundonald, being fully determined, failzieing Heirs Male of our own Body, or Heirs Male of any of the Descendents of our own Body, To settle the Succession of our Estate in one Person: And that the same may not be divided by the Succession of Heirs Portioners, Do hereby bind and oblige us, and our Heirs of Line, Male, Tailzie, Conquests, and Provision, and Successors whatsoever, failzieing Heirs Male, as said is, To provide and secure Heritably, and to make Resignation of All and Sundry Lands, Lordships, Baronies, Jurisdictions, Lands, Tenements, Teinds, and all others whatsoever pertaining and belonging to us, and contained in our Securities, Rights and Infeftments thereof, in the Hands of our immediate Superiors, To and in favour of our eldest lawful Daughter, Lady Anne Cochran, and the Heirs Male lawfully to be procreate of her Body; which failzieing, To Lady Susanna Cochran, and the Heirs Male lawfully to be procreate of her Body; which failzieing, To Lady Katharine Cochran, and the Heirs Male lawfully to be procreate of her Body, our Third and youngest lawful Daughter; which failzieing, To our other Daughters to be procreate of our Body, successive, and the Heirs Male of their Bodies; which failzieing, To our other Heirs Male whatsoever; which all failzieing, To our other Heirs and Assignies whatsoever; the eldest Heir female, and the Descendents

dents of her Body, succeeding always without Divi-
 on, and excluding all other Heirs Portioners, for new
 Infeftment, State, and Sasine thereof, to be made,
 given and granted to our faids Children, and their
 foresaids, in the Case, Event, and Order abobe-men-
 tioned. And we hereby Design, Nominate and Ap-
 point our faids Daughters, and the Heirs of their Bo-
 dies, and the other Substitutes abobe-narrated, in the
 Order and Terms successivè, abobe-specified, to be
 Heirs of Tailzie and Provision to us, and to the Heirs
 Male of our Body, or Heirs Male of any of the Descen-
 dents of our Body, in the whole Lands, Lordships, Ba-
 ronies, Teinds, Tenements, and other heritable Sub-
 jects abobe-mentioned, contained in our Rights, Se-
 curities and Infeftments thereof; with Power to
 them, in the Order, Event, and Terms abobe-men-
 tioned, respectivè and successivè, after others, to take
 out Brieves, and obtain themselves served and retour-
 ed Heirs of Tailzie and Provision to us therein, and
 obtain themselves entred and infeft in the saids Lands,
 Lordships, Baronies, Jurisdictions, and others abobe-
 mentioned. And we do by thir Presents, Make and
 Constitute, in the Event foresaid, the said Lady Anne
 Cochran and her foresaids, and our other Daughters
 and their Heirs, in the Order abobe-mentioned, our
 lawful Cessioners and Assignies, in and to the Pre-
 cepts of Sasine, Procuratories of Resignation, and all
 other Clauses that can be conceived or interpret in our
 favours, contained in the Securities, Writs, Rights
 and Evidents of and concerning the Lands, Lord-
 ships, Baronies, Jurisdictions, and others abobe-men-
 tioned; with Power to our Children and their fore-
 saids, in the Event and Order abobe-mentioned, to
 procure themselves infeft and sased therein, and there-
 by Buik, Enjoy and Possess the samen, Aflist and
 Re-

Receibe the Hails and Duties thereof as fully and freely as we can do ourselves at granting hereof, dispensing with the Generality and Informality hereof, and allowing the same to be als valid, effectual and sufficient, to all Intents and Purposes, as if the foresaids Lands, Lordships, Baronies, Jurisdicions, Tenements, Tcinds, and others foresaids, were particularly and fully insert in an full and formal Disposition of Tailzie and Conveyance thereof, in the Event and Order aboves-mentioned: And we hereby declare this to be a valid Evident, albeit it be lying in our Custody, or in the Keeping of any person, undelibered at the Time of our Decease; notwithstanding of whatever Act, Law or Practique made, or to be made in the contrary, wherewith we, for us and our foresaids, by these Presents, dispense for now and ever. And we consent to the Registration hereof in the Books of any Judicatory competent therein, to remain for Preservation, and constitutes, &c. Procurators, &c. In Witness whereof thir Presents, written by Mr. John Cochran Writer in Edinburgh, on Stamp Paper, are subscribed by us at Edinburgh the Thirti first Day of December, One thousand seven hundred and sixteen Years, before thir Witnesses, Mr. William Wood our Chamberlain at Paisley, and the said Mr. John Cochran.

DUNDONALD.

WILLIAM WOOD *Witness.*
JOHN COCHRAN *Witness.*

This is registrated in the Books of Council and Session the 18. of June, 1720 Years.